

9-26-2011

Hobson Manufacturing Corp. v. SE/Z Const. Augmentation Record Dckt. 38202

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In the Supreme Court of the State of Idaho

HOBSON FABRICATING CORP., an Idaho corporation,
Plaintiff-Appellant,

vs.
STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,
Defendant-Counterclaimant-Respondent,

and

SEIZ CONSTRUCTION, LLC, an Idaho
limited liability company,
Defendant-Counterdefendant,

vs.
SEIZ CONSTRUCTION, LLC, an Idaho
limited liability company,
Cross-Claimant,

vs.
STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,
Cross-Defendant,

Cross-Defendant

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,
Counter Cross-Claimant,

vs.
Counter Cross-Claimant,

ORDER GRANTING MOTION TO
ALIGNMENT CLERK'S RECORD ON
APPEAL

Supreme Court Docket No. 38202-2010
Ada County No. 2005-11467

SEIZ CONSTRUCTION, LLC, an Idaho
limited liability company,
Counter Cross-Defendant,

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,
Third-Party Plaintiff,

Third-Party Defendant,

RUBEN & ASSOCIATES, a professional
company, an Idaho limited liability company,
Third-Party Defendant,

RESPONDENT'S MOTION ALIGNMENT CLERK'S RECORD ON APPEAL, and
RESPONDENT'S STATEMENT IN SUPPORT OF MOTION TO ALIGNMENT CLERK'S
RECORD ON APPEAL, were filed by counsel for Respondent on September 20, 2011. Therefore,
good cause appearing,

IT HEREBY IS ORDERED that RESPONDENT'S MOTION ALIGNMENT CLERK'S
RECORD be, and hereby is, GRANTED and the signature record shall include the documents
listed below, the stamped copies of which accompanied this Motion:

1. Memorandum of Points and Authorities in Support of SEIZ Construction, LLC's Motion
for Partial Summary Judgment, (file-stamped April 14, 2006);
2. Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SEIZ
Construction, LLC's Motions for Partial Summary Judgment, (file-stamped May 22,
2006);
3. Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to Hobson
Fabricating Corp.'s and SEIZ Construction, LLC's Motions for Partial Summary
Judgment, with enclosures, (file-stamped May 22, 2006);
4. Affidavit of Albert F. Minto in Support of Defendant State of Idaho's Opposition to
Hobson Fabricating Corp.'s and SEIZ Construction, LLC's Motions for Partial
Summary Judgment, with enclosures, (file-stamped May 22, 2006);
5. Affidavit of Joe Rutledge in Support of Defendant State of Idaho's Opposition to
Hobson Fabricating Corp.'s and SEIZ Construction, LLC's Motions for Partial Summary
Judgment, (file-stamped May 22, 2006).

ORDER GRANTING MOTION TO ALIGNMENT CLERK'S RECORD ON APPEAL - Docket No.
38202-2010

ORDER GRANTING MOTION TO ALIGNMENT CLERK'S RECORD ON APPEAL - Docket No.
38202-2010

6. Affidavit of Jan Fries in Support of Defendant State of Idaho's Opposition to Hobson
Fabricating Corp.'s and SEIZ Construction, LLC's Motions for Partial Summary
Judgment, (file-stamped May 22, 2006);
7. Memorandum in Support of SEIZ Construction, LLC's Motion for Partial Summary
Judgment, (file-stamped October 27, 2006);
8. Defendant State of Idaho's Opposition to SEIZ Construction, LLC's Motion for Partial
Summary Judgment and Plaintiff Hobson Fabricating Corp.'s Answer to SEIZ's Motion,
(file-stamped November 20, 2006); and
9. Order Denying Motion for Reconsideration, (file-stamped December 14, 2007).

DATED this 24th day of September, 2011.

For the Supreme Court

Stephen W. Kemper, Clerk

cc: Counsel of Record

LAW CLERK

AUGMENTATION RECORD

ORDER GRANTING MOTION TO ALIGNMENT CLERK'S RECORD ON APPEAL - Docket No.
38202-2010

In the Supreme Court of the State of Idaho

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff-Appellant,

v.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Counterclaimant-Respondent,

and

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Defendant-Counterdefendant.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Cross-Defendant.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counter Cross-Claimant,

v.

ORDER GRANTING MOTION TO
AUGMENT CLERK'S RECORD ON
APPEAL

Supreme Court Docket No. 38202-2010
Ada County No. 2005-11467

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter Cross-Defendant.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third-Party Plaintiff,

v.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third-Party Defendant.

RESPONDENT'S MOTION AUGMENT CLERK'S RECORD ON APPEAL and
RESPONDENT'S STATEMENT IN SUPPORT OF MOTION TO AUGMENT CLERK'S
RECORD ON APPEAL were filed by counsel for Respondent on September 20, 2011. Therefore,
good cause appearing,

IT HEREBY IS ORDERED that RESPONDENT'S MOTION AUGMENT CLERK'S
RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents
listed below, file stamped copies of which accompanied this Motion:

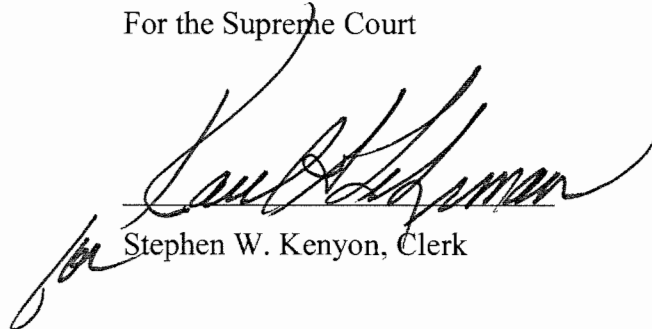
1. Memorandum of Points and Authorities in Support of SE/Z Construction, LLC's Motion for Partial Summary Judgment, file-stamped April 14, 2006;
2. Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment, file-stamped May 22, 2006;
3. Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment, with attachments, file-stamped May 22, 2006;
4. Affidavit of Albert F. Munio in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment, with attachments, file-stamped May 22, 2006;
5. Affidavit of Joe Rutledge in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment, file-stamped May 22, 2006;

ORDER GRANTING MOTION TO AUGMENT CLERK'S RECORD ON APPEAL – Docket No.
38202-2010

6. Affidavit of Jan Frew in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp's And SE/Z Construction, LLC's Motions for Partial Summary Judgment, file-stamped May 22, 2006;
7. Memorandum in Support of SE/Z Construction, LLC's Motion for Partial Summary Judgment, file-stamped October 27, 2006;
8. Defendant State of Idaho's Opposition to SE/Z Construction, LLC's Motion for Partial Summary Judgment and Plaintiff Hobson Fabricating Corp's Joinder in SE/Z's Motion, file-stamped November 20, 2006; and
9. Order Denying Motion for Reconsideration, file-stamped December 14, 2007.

DATED this 26th day of September, 2011.

For the Supreme Court



for Stephen W. Kenyon, Clerk

cc: Counsel of Record

A

Frederick J. Hahn, III, Esq. (ISB No. 4258)
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NO. Lodged
A.M. FILED P.M. 4:10
APR 14 2006
By J. DAVID NAVARRO, Clerk
DEPUTY

Attorneys for SE/Z Construction, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an
Idaho corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, acting by and through its
Department of Administration, Division
of Public Works,

Defendants,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an
Idaho corporation,

Counter-Defendant,

Case No. CV-OC-0508037

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SE/Z CONSTRUCTION, LLC'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

ORIGINAL

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter-Cross-Defendant,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Third-Party Plaintiff,

v.

RUDEEN & ASSOCIATES, A
PROFESSIONAL COMPANY, an Idaho
limited liability company,

Third-Party Defendant.

Defendant/Cross-Claimant SE/Z Construction, L.L.C., by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

I.
INTRODUCTION

A. Parties.

Defendant/Cross-Claimant SE/Z Construction, LLC (“SE/Z”) is an Idaho limited liability company, principally located in Idaho Falls, Idaho. SE/Z is a general contractor licensed to perform public works within the State of Idaho. (Cross-Claim ¶ 1).

Plaintiff/Cross-Defendant Hobson Fabricating Corp. (“Hobson”) is an Idaho corporation, principally located in Ada County, Idaho. (Complaint ¶ 1). Hobson is a specialty subcontractor performing Heating, Ventilation, and Air Conditioning (“HVAC”) work and is licensed to perform both public works and HVAC work within the State of Idaho. (Complaint ¶ 1).

Department of Administration, Division of Public Works (“DPW”) is a subdivision of the State of Idaho, which executed and administrated the Contract for the Idaho Department of Agriculture, which was to be the ultimate owner on the construction project at issue in this matter. (DPW Answer ¶3).

SE/Z is informed and believes that Rudeen & Associates a Professional Company (“Rudeen”) is a professional limited liability company, principally located in Ada County Idaho. Rudeen was the architect on the project at issue in this matter.

B. The Project

The project at issue in this matter was known as the Bio Safety Level 3 Laboratory Project (the “Project”) DPW Project No. 02353. SE/Z was awarded the Contract with DPW to build the Project pursuant to a competitive bid. Zambarano Affidavit ¶2. The Project work entailed renovating a portion of the Idaho Department of Agriculture Building located in Boise, Idaho, and the installation of HVAC, as was set forth particularly in design plans and specifications supplied by DPW.

C. SE/Z’S Motion

By its Motion, SE/Z seeks an award of partial summary judgment as to liability for its cross-claims against DPW. Additionally, SE/Z seeks dismissal of all affirmative claims stated by DPW in its Cross-Claim against SE/Z.

**II.
ANALYSIS**

A. Summary Judgment Standard

Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, SE/Z is entitled to summary judgment upon a showing that there are no genuine issues of material fact precluding summary judgment and that it is entitled to judgment as a matter of law. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982).

SE/Z submits that this Motion presents a purely legal question, as there are no genuine issues of material fact. The contractual provisions between SE/Z and DPW are

undisputed.¹ It is undisputed that DPW terminated the Contract between the parties for its own convenience. (Zambarano Aff., Ex “E”).

B. The Court Should Enforce the Parties’ Unambiguous Contract Provisions

This matter relates to a Government Contract between SE/Z and DPW. As a Governmental Owner, DPW, had several avenues by which it could cancel the Contract. Namely, it had the ability to terminate the Contract for Default upon establishing that SE/Z had failed to properly perform the work or construct the Project in accordance with the Project plans and specifications. That provision is found at Article 14.2 of the General Conditions of the Contract. (Zambarano Aff., Ex.”C”). Alternatively, DPW was entitled to terminate the Contract for its own convenience pursuant to Article 14 of the Prime Contract General Conditions and Supplementary Conditions. (Zambarano Aff., Ex. “C” and “D”). The termination for convenience provisions state:

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner’s convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner’s convenience, the Contractor shall:

- .1** cease operations as directed by the Owner in the notice;
- .2** take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

¹ The parties’ Contract includes the Prime Contract attached to Mr. Zambarano’s Affidavit as Exhibit “A”, a one page Amendment of Contract (Exhibit “B”), General Conditions (Exhibit “C”) and Supplementary Conditions (Exhibit “D”).

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

~~14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.~~

General Condition 14.4 (struck language supplemented by Supplementary Conditions).

This Article was modified by the Supplementary Conditions which state:

14.4 Termination by the Owner for Convenience

Delete subparagraph 14.4.3 and substitute the following:

14.4.3 In the case of such termination for the Owner convenience, the Contractor shall be entitled to receive payment from the Owner on the same basis provided in Subparagraph 14.1.3, as modified.

Zambarano Aff., Ex. "D".

General Condition 14.1.3, as modified by Supplementary Condition 14.4.3, states:

If one of the reasons described in Subparagraph 14.1.1 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead and profit.

Zambarano Aff., Ex. "C" as modified by Ex. "D" (emphasis added).

It is undisputed that on June 3, 2005, DPW chose to terminate the Contract for its own convenience pursuant to the Contract provisions 14.4. (Zambarano Aff., Ex. "E").

By this Motion, SE/Z submits that in exercising its right to terminate the parties' Contract for its own convenience, DPW foreclosed its ability to terminate the Contract for Default and precluded any claims for offset as asserted in its cross-claims against SE/Z and Hobson. SE/Z submits that this Court should enforce the plain language of the parties' Contract, which will result in a determination that DPW is liable to SE/Z for its costs incurred on the Project through the date of the termination.

In *McKay v. Boise Project Board of Control*, 141 Idaho 463, 111 P.3d 148 (2005), the Idaho Supreme Court set forth the contract interpretation principles applicable to this Motion stating:

Construction of the meaning of a contract begins with the language of the contract. "If the contract's terms are 'clear and unambiguous,' the determination of the contract's meaning and legal effect are questions of law . . . and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." If, however, the contract is determined to be ambiguous, "the interpretation of the document is a question of fact which focuses upon the intent of the parties." *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001) (citations omitted). In determining whether a contract is ambiguous, this Court ascertains whether the contract is "reasonably subject to conflicting interpretation." *Bondy v. Levy*, 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992). "The determination and legal effect of a contractual provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties." *Id.* at 997, 829 P.2d at 1346. Questions of law are reviewed by the Court *de novo*. *Id.*

McKay, 141 Idaho at 156.

Moreover, in construing the parties' Contract, the Court should endeavor to consider the Contract as a whole, giving meaning to all of the provisions. *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 18 P.3d 956 (2000).

Applying Idaho contract interpretation law to the clear and unambiguous provisions of the parties' Contract in this matter, leads to the conclusion that DPW is liable to SE/Z for the costs of its work on the Project through the date of DPW's termination for convenience. There is no provision in the termination for convenience provisions of the parties' contract, which gives DPW the right to assert offsets or counter claims. In fact DPW's attempts to offset defeat the plain and unequivocal language of the contract provision. SE/Z submits, as identified herein below, that enforcing the parties' Contract under the termination for convenience provision also must result in a dismissal of DPW's claims against SE/Z as set forth in its Cross-Claim.

C. DPW's Termination for Convenience Forecloses its Cross-claims

While there are no Idaho cases analyzing the affect of DPW's termination for convenience at issue in this matter, there are numerous Federal cases which discuss and analyze the effect of DPW's actions as it relates to affirmative claims as asserted by DPW in its Cross-Claim. Federal Courts and Boards of Contract Appeal have uniformly held that the Government's exercise of a termination for convenience remedy precludes a Governmental owner's right to assert a counterclaim or seek offsets against the contractor.

In *New York Ship Building Co.*, ASBCA No. 15443, 73-1 BCA ¶ 9, 852 (1972), the Armed Services Board of Contract Appeals confronted a Governmental Owner's attempts to offset amounts due a contractor on a contract which had been terminated for the Government's convenience. In *New York Ship Building*, the contractor was engaged to construct a nuclear submarine for the Navy. Prior to the ultimate completion of the project, the Navy terminated the contract for its own convenience. The Navy retained another contractor (Ingalls) to complete the project and sought to obtain, by way of offset, the amounts to be paid Ingalls for alleged deficient work performed by the contractor, *New York Ship Building*. After a lengthy analysis, the Board denied the Government's attempts to offset, stating:

In this claim the Government is endeavoring to recover from appellant the amounts paid or to be paid Ingalls, which amounts are said to represent the Government's cost of correcting deficiencies in appellant's work. Appellant challenges the validity of this claim on several alternative grounds. We hold that the termination for convenience precludes the Government from recovering the amounts paid for correcting the alleged deficiencies, even if the existence of such deficiencies were proved and the Government's cost of correcting them were established. Accordingly we do not consider other contentions presented by appellant in the alternative.

In several previous cases we have held that where a contract is terminated for convenience of the Government, the contractor is entitled to recover its reasonable, allocable, and allowable costs incurred with respect to termination inventory even if such inventory did not comply in all respects with specification requirements. The *Douglas Corporation*, ASBCA No. 5550, 60-1 BCA par. 2531; *Atlas Can Corp.*, ASBCA No. 3381, 60-1 BCA par. 2651; *Caskel Forge, Inc.*, ASBCA No. 7638, 1962

BCA par. 3318; *Remsel Industries, Inc.*, ASBCA No. 8462, 1963 BCA par. 3918; *Best Lumber Sales*, ASBCA No. 16737, 72-2 BCA par. 9661. The rationale for this holding was set forth in *Caskel Forge*, supra, in which we stated that the general effect of a termination for convenience of a fixed price contract is to convert the terminated portion of the contract into a cost reimbursement contract and to provide for the reimbursement of allowable costs incurred in the performance of the terminated portion of the contract. We stated that

'Costs of producing defective work are normally reimbursable under a cost reimbursement contract, unless it is established that the defective production resulted from 'the contractor's own fault or folly' or 'careless conduct of the work or other disregard of his contractual duties.' 21 Comp. Gen. 149, 151.'

We further stated in effect that while a fixed price contractor is not entitled to be paid for items which do not comply with specification requirements, *the termination for convenience deprives the contractor of the opportunity to recoup expenses associated with defective work incurred in the early stages of performance.*

New York Ship Building Co., ASBCA No. 15443, 73-1 BCA ¶ 9, 852 (italic emphasis added).

Similarly, the United States Court of Federal Claims has held that the effect of the termination for convenience precludes a Governmental Owner's ability to recoup costs by offset or counterclaim. *Line Construction Co. v. United States*, 109 Ct. Cl. 154 (1947), *Timberline Paving Construction Co. v. United States*, 18 Ct. Cl. 129 (1989).

SE/Z respectfully submits that while the foregoing authorities are only persuasive authority on this Court, the holdings are in keeping with Idaho contract interpretation principles. Particularly, if the Court enforces the plain and unambiguous language of the

termination for convenience provisions of the parties contract, it will necessarily preclude DPW's attempt to offset its costs under the parties' Contract. There is no construction of the termination for convenience provision in the parties' Contract which allows an offset by DPW. If DPW indeed thought it had the right to terminate the contract for reasons other than its convenience, it had an opportunity to do so. By terminating for convenience, DPW precluded its claims of offset. *Line Construction Co. v. United States*, 109 Ct. Cl. 154 (1947) and *Richardson Camera Co., Inc.*, ASBCA No. 11930, 68-1 BCA ¶ 6990 (1968). SE/Z respectfully submits that it had been unable to find authority for the actions sought by DPW in its Cross-Claim.

III. **CONCLUSION**

Based upon the foregoing, SE/Z respectfully submits that it is entitled to Judgement as to liability on its claims against DPW relating to the Termination of the Contract for DPW's convenience. Moreover, the affirmative claims by DPW against SE/Z and Hobson should be dismissed.

Dated this 14th day of April, 2006.



Frederick J. Hahn, III
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 14th day of April, 2006.

**DOCUMENT SERVED: MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF SE/Z CONSTRUCTION, LLC'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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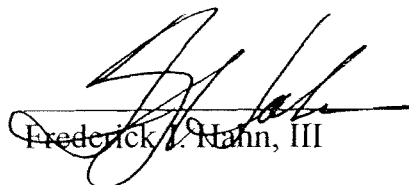
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Frederick L. Nahn, III

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Attorneys for Defendants State of Idaho, Ken Gardner, David Rooke,
Jan Frew, Larry Osgood, Chris Motley, and Elaine Hill

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company; and STATE OF IDAHO,
acting by and through its Department of
Administration, Division of Public Works,

Defendants,

)
) Case No. CV OC 0508037
)
) [Consolidated with Case No.CV OC 06-
) 00191]
)
) **DEFENDANT STATE OF IDAHO'S**
) **OPPOSITION TO HOBSON**
) **FABRICATING CORP.'S AND SE/Z**
) **CONSTRUCTION, LLC'S MOTIONS**
) **FOR PARTIAL SUMMARY**
) **JUDGMENT**
)
)
)

COPY
NO. _____
FILE# _____
P.M. _____
A.M. _____
MAY 22 2006
J. DAVID NAVARRO, Clerk
By M. SHAPEL
DEPUTY

COPY

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant,

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter-Cross-Defendant.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works

Third-Party Plaintiff,

v.)
)
RUDEEN & ASSOCIATES, A)
PROFESSIONAL COMPANY, an Idaho)
limited liability company,)
)
Third-Party Defendant.)
)
HOBSON FABRICATING CORP., an Idaho)
corporation,)
)
Plaintiff,)
v.)
)
KEN GARDNER, an individual; DAVID)
ROOK, an individual; JAN FREW, an)
individual; LARRY OSGOOD, an individual;)
CHRIS MOTLEY, an individual; and ELAINE)
HILL, an individual,)
)
Defendants,)
)

COMES NOW defendant State of Idaho, Department of Administration, Division of Public Works (“the State”), by and through its undersigned counsel of record, and hereby submits this Opposition to Hobson Fabricating Corp.’s and SE/Z Construction, LLC’s Motions for Partial Summary Judgment.

INTRODUCTION

On April 11, 2006, plaintiff Hobson Fabricating Corp. (“Hobson”) filed its Motion for Partial Summary Judgment on Liability and for Summary Judgment Against the State of Idaho, Department of Administration, Division of Public Works’ Counterclaims (“Hobson’s Motion”) and supporting Memorandum (“Hobson’s Memorandum”). Defendant SE/Z Construction, LLC (“SE/Z”) filed its nearly identical Motion for Partial Summary Judgment (“SE/Z’s Motion”) and supporting Memorandum of Points and Authorities (“SE/Z’s Memorandum”) on April 14, 2006.

Because the two Motions address the same legal issues, the State responds to them concurrently in this Opposition.

Hobson and SE/Z have inaccurately portrayed the Contract at issue in this litigation, as well as the current state of the law with respect to terminations for convenience, as a simple and unambiguous legal matter warranting summary judgment on their behalf. To the contrary, neither the Contract itself, nor the legal authority on the subject, support Hobson's and SE/Z's positions. Even if the Court were to take into consideration the non-binding authority to which Hobson and SE/Z cite for the proposition that the State is precluded from pursuing its claims and defenses in this matter following the termination for convenience, the cases cited specifically provide that the State may pursue setoffs against claimed costs and may raise counter-claims for grossly deficient or faulty work or work that deviates from the Contract specifications to the point that such costs are unreasonable, and genuine issues of material fact exist with respect to the quality of Hobson's work on the Project. The same exception should apply to the State's ability to pursue its cross-claims and counter-claims (hereinafter collectively referred to as "counter-claims") in this matter. Genuine issues of material fact surround the question of the State's liability to Hobson and SE/Z and of Hobson's and SE/Z's liability to the State on its counter-claims. For the reasons discussed below, the State respectfully requests that this Court deny Hobson's and SE/Z's Motions.

BACKGROUND¹

On or about July 1, 2003, the State awarded a contract (“the Principal Contract” or “the Contract”) to SE/Z for “DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3” (“the Project”). (Complaint ¶ 6.) The Project involved the construction of a Level 3 Bio-Safety Lab (“BSL-3”) in Boise, Idaho. The BSL-3, once constructed, was intended to serve as a facility capable of handling extremely dangerous substances, such as anthrax or avian flu virus, enabling the State to analyze and contain such substances. (Affidavit of Elaine Hill in Support of Defendant State of Idaho’s Opposition to Hobson Fabricating Corp.’s and SE/Z Construction, LLC’s Motions for Partial Summary Judgment (“Hill Aff.”) ¶ 2); (Affidavit of Albert F. Munio in Support of Defendant State of Idaho’s Opposition to Hobson Fabricating Corp.’s and SE/Z Construction, LLC’s Motions for Partial Summary Judgment (“Munio Aff.”), ¶ 10); (Affidavit of Joe Rutledge in Support of Defendant State of Idaho’s Opposition to Hobson Fabricating Corp.’s and SE/Z Construction, LLC’s Motions for Partial Summary Judgment (“Rutledge Aff.”), ¶ 8.) Because of the unique purpose of the BSL-3, it was absolutely critical that the facility be constructed correctly, as specified by the construction documents, to ensure that the substances handled in the BSL-3 would not endanger employees of the laboratory or the surrounding citizenry. (See Munio Aff. ¶10.)

On or about August 25, 2003, SE/Z signed a Subcontract Agreement (“the Subcontract”) with Hobson, whereby Hobson agreed to perform mechanical work on the Project as a subcontractor under SE/Z. (Id. ¶ 8.) The mechanical work on the Project was the most critical

¹ For more detail with respect to the facts of this case, please refer to the affidavits filed in conjunction with this Opposition. In their Motions, Hobson and SE/Z argue only that it is undisputed that the State terminated for convenience its Contract with SE/Z and that the Contract contains certain provisions. The State agrees that it terminated the Contract for convenience and that the Contract contains the provisions set forth in Hobson’s and SE/Z’s Memoranda. Hobson and SE/Z do not set forth any further alleged undisputed facts. Nevertheless, the State hereby refers the Court to the affidavits filed herewith, setting forth factual issues surrounding the Project.

component for the safe operation of the facility, as it involved the exhaust systems, which were intended to filter and capture the dangerous substances handled in the BSL-3 and to prevent them from being released into the laboratory or the atmosphere. (Hill Aff. ¶ 9); (Munio Aff. ¶ 10.) Work on the Project commenced in approximately September 2003, with an anticipated completion date of May 26, 2004. (Hill Aff. ¶ 3); (Affidavit of Jan Frew in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Frew Aff."), ¶ 2.) However, to date, the Project has yet to be completed.

Various issues with SE/Z's and Hobson's workmanship arose during the Project. For example, in approximately January 2004, the State and the engineer on the Project, Traci Hanegan, discovered that Hobson had installed an inferior grade of stainless steel with respect to the ductwork. (Hill Aff. ¶ 5); (Frew Aff. ¶ 3); (Rutledge Aff. ¶ 3.) In addition, in the Spring and Summer of 2004, the State brought in a third-party welding inspector, Mark Bell, to inspect Hobson's welds on the ductwork. (Hill Aff. ¶ 6 and Ex. A); (Frew Aff. ¶ 4); (Rutledge Aff. ¶ 4.) Mr. Bell discovered on both occasions that Hobson had performed reckless welding. (Id.) By this point in time, the Project was considerably delayed, due, in large part, to Hobson's actions. (Hill ¶¶ 5, 7); (Frew Aff. ¶¶ 3, 5-6); (Rutledge Aff. ¶¶ 5-6.) In the Spring of 2005, the State discovered that Hobson had negligently failed to install dampers clearly specified in the construction documents. (Hill Aff. ¶ 7); (Frew Aff. ¶ 5); (Rutledge Aff. ¶ 5.) These dampers were critical to the successful filtration and capture of substances handled in the BSL-3, and were necessary to prevent the release of such substances into the outside air. (Hill Aff. ¶ 7.) This incident resulted in further delay of the Project, which, by this time, appeared to be making

no progress towards completion. (Hill Aff. ¶ 7); (Frew Aff. ¶¶ 5-6); (Rutledge Aff. ¶¶ 5-6.) SE/Z, as the general contractor, failed to keep the Project on schedule. (Hill Aff. ¶ 7.)

In June 2005, DPW, which believed that the Project was 90% complete and would require only a relatively small sum of money to reach completion, decided to terminate its Contract with SE/Z for convenience.² (Hill Aff. ¶ 8); (Frew Aff. ¶ 6); (Rutledge Aff. ¶ 6.) Following its termination for convenience, DPW retained Washington Group International (“Washington Group”) to inspect the work completed on the Project in order to determine what work was still needed to reach completion of the Project. (Hill Aff. ¶ 9); (Munio Aff. ¶ 2); (Frew Aff. ¶ 7); (Rutledge Aff. ¶ 7.) Washington Group ultimately discovered that the mechanical work completed by Hobson was unacceptable by normal industry standards, was grossly defective, and deviated grossly from the Contract specifications. (Munio Aff. ¶¶ 4-11, 12-13 and Ex. B); (Frew Aff. ¶ 7); (Rutledge Aff. ¶ 7); (Hill Aff. ¶ 9.) Washington Group’s inspection revealed serious concealed defects with Hobson’s work, including unacceptable weld conditions (such as a failure to “purge” the welds with argon gas) and seriously damaged materials due to installation error. (Id.) As currently constructed, the bio-safety lab cannot operate safely. (Munio Aff. ¶ 10.) The original Contract with SE/Z provided a budget of \$1,314,883 to complete the entire Project. (Frew Aff. ¶ 1.) Hobson was to receive a total of \$657,500 for its work on the Project. (Complaint, Ex. A (Subcontract), Art. I.) Despite the fact that Hobson had allegedly completed approximately 90% of its work on the Project, in order to bring the Project to completion, the State must now replace much of Hobson’s mechanical work at a cost of well over one million dollars. (Munio Aff. ¶¶ 3, 12); (Munio Aff., Ex. B, p. 11711); (Hill Aff. ¶ 9.) In other words, the State must expend more than the original Contract price for Hobson’s work—and nearly the full

² A termination for convenience is a one-sided termination, whereby the State may terminate the Contract regardless of the other party’s performance under the Contract. This one-sided clause is agreed to by the parties to the Contract. (See Zambarano Aff., Ex. C, Art. 14.4, as modified by Ex. D, Art. 14.4.)

original Contract price for the entire Project—to bring the BSL-3 to completion in accordance with the Contract specifications and in a manner that ensures the safety of the surrounding citizenry.

Despite the above gross deficiencies in its work on the Project, Hobson has filed this lawsuit against the State, demanding its costs incurred on the Project, as well as damages for breach of contract and breach of warranty. (Complaint.) SE/Z has filed a cross-claim against the State, seeking payment for Hobson's incurred costs, given that SE/Z was the Prime Contractor on the Project. (SE/Z's Cross-Claim.) The State, in turn, has filed counter-claims against Hobson for breach of contract, breach of warranty, indemnity, and contribution, as well as cross-claims against SE/Z for breach of contract, breach of warranty, breach of implied warranty of workmanship, breach of the duty of good faith and fair dealing, indemnity, and contribution. SE/Z and Hobson now seek summary judgment on the State's cross-claims and counter-claims and on the issue of the State's liability for Hobson's and SE/Z's claimed costs.

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is only appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); City of Sun Valley v. Sun Valley Co., 128 Idaho 219, 912 P.2d 106 (1996). The Court must liberally construe the facts in favor of the non-moving party when making its determination. I.R.C.P. 56(c); Quinlan v. Idaho Com'n for Pardons & Parole, 138 Idaho 726, 69 P.3d 146, 149 (2003). “In making this determination, all allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion.” Id., citing Thomson v. City of

Lewiston, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). The moving party bears the burden of establishing the absence of material facts. Quinlan, 138 Idaho at 149.

ARGUMENT

Hobson and SE/Z have failed to demonstrate entitlement to judgment as a matter of law. The Contract and the state of the law do not, as Hobson and SE/Z assert, unambiguously entitle those parties to summary judgment in their favor, but instead provide for the State's right to assert its counter-claims and seek an offset against Hobson's and SE/Z's claims. Further, genuine issues of material fact surround the issue of Hobson's and SE/Z's entitlement to recover any costs in connection with the Project and of the State's ability to pursue its claims against Hobson and SE/Z because of the gross deficiencies with Hobson's work. Summary judgment in favor of Hobson and SE/Z is not warranted.

A. The State's Counter-Claims and Defenses Are Not Precluded by Law

1. The Cases to Which Hobson and SE/Z Cite Are Not Controlling

Hobson and SE/Z argue that the State's counter-claims are precluded as a matter of law, solely due to the State's termination of its Contract with SE/Z ("the Contract") for convenience. Hobson and SE/Z point to absolutely no binding authority for this proposition, instead discussing non-binding federal cases, primarily from the Armed Services Board of Contract Appeals. The Contract provides: "The Contract shall be governed by the law of the place where the Project is located." (Affidavit of Steve Zambarano, filed in connection with SE/Z's Memorandum ("Zambarano Aff."), Ex. C (General Conditions of the Contract), Art. 13.1.1.) As Hobson and SE/Z note, "there are no Idaho cases analyzing the [e]ffect of [the State's] termination for convenience" (SE/Z's Memorandum, p. 8.)³

³ Hobson asserts: "There is no caselaw support in the State of Idaho for what [the State] is attempting to accomplish in this case" (Hobson's Memorandum, p. 6.) This reasoning applies to Hobson's and SE/Z's

Hobson and SE/Z urge this Court to make an unjustified leap into a body of general federal common law, applying such law to a non-federal Contract that the parties specifically agreed would be governed by the law of Idaho. (Zambarano Aff., Ex. C, Art. 13.1.1.) In so doing, Hobson and SE/Z ask the Court to blindly ignore the Contract's language to which the parties specifically agreed. Hobson and SE/Z insinuate that a termination for convenience is somehow isolated from the agreed-to contractual provisions for termination and for rights and remedies under the Contract, suggesting that it is a process with a life of its own. In short, Hobson and SE/Z seek, without justification, to have this Court effectively throw out the State's entire Contract with SE/Z. Contrary to Hobson's and SE/Z's unsupportable position, the terms of the Contract clearly control and justify the claims and defenses raised by the State.

2. The Cases to Which Hobson and SE/Z Cite Have Been Called Into Doubt

Even if the federal cases to which Hobson and SE/Z cite constituted controlling law, which they do not, such cases have been called into doubt. Despite Hobson's and SE/Z's attempt to paint a picture of "uniform" and "well-established" federal law supporting their argument, several federal courts have specifically held that counter-claims can be raised following a termination for convenience, as can offsets of the contractor's claimed costs. See, e.g., Appeal of E.A. Cowen Constr., Inc., 1966 WL 651, 66-2 BCA P 6060 (ASBCA 1966) (allowing for a counter-claim raised by the federal Government following its termination for convenience of a contract); Timberland Paving and Constr., 18 Cl. Ct. at 141 (holding that the federal Government's offset for liquidated damages against the contractor's payment claims was allowable following a termination for convenience).

position, as well, as there is no Idaho caselaw supporting their contention that the termination for convenience precludes the State's counter-claims and right to offset claimed costs.

In fact, the case upon which both Hobson and SE/Z rely most heavily in their briefing, Appeal of New York Shipbuilding Co., 1972 WL 1601, 73-1 BCA P 9852 (ASBCA 1972), has been explicitly refuted:

Appellant relies on the rule set forth in New York Shipbuilding Co. . . . that Government offset claims for corrective work are not recoverable where there has been a convenience termination. . . .

. . . [W]e hold that the rule in New York Shipbuilding does not serve as an automatic bar to Respondent's counterclaims and that they should be considered on their merits. . . . The express agreement of the parties on the question takes precedence over any contrary holding, particularly of another board whose determinations, while accorded great respect, are not controlling on us.

* * *

[T]he continued applicability of New York Shipbuilding and its forerunners is seriously in doubt.

* * *

Finally, even if New York Shipbuilding is still viable, it is distinguishable here on the facts. New York Shipbuilding dealt with a termination for convenience early in the life of the contract before the contractor was able to correct deficiencies. . . . In this case, however, termination occurred very late in performance, after Appellant had delivered virtually all the hardware to the site, and had ample time to make corrections Under such circumstances, it is questionable if New York Shipbuilding ever controlled this case.

Aydin Corp., 1989 WL 74785, 89-3 BCA P 22044 (EBCA 1989) (emphasis added); see also Appeal of Air-Cool, Inc., 1987 WL 46144, 88-1 BCA P 20399 (ASBCA 1987) (recognizing that it is questionable whether the rule set forth in New York Shipbuilding will continue to be followed.)

3. The Cases to Which Hobson and SE/Z Cite Are Distinguishable

a. *The Contract Preserves the State's Rights and Remedies*

In addition to the above, the non-binding federal cases to which Hobson and SE/Z cite are distinguishable from the case at hand. Hobson and SE/Z have failed to acknowledge that even cases holding that a termination for convenience precludes offsets or counter-claims, such as New York Shipbuilding, first involved an examination of the specific contract involved, rather than a uniform bar upon the Government's right to pursue such claims under all circumstances. See, e.g., New York Shipbuilding, 1972 WL 1601, 73-1 BCA P 9852 (holding that the termination for convenience provisions of the contract involved did not provide for a Government counterclaim, but that such a counterclaim could "be grounded upon rights acquired under other provisions of the contract or elsewhere."); Appeal of Caskel Forge, Inc., 1962 WL 573, 1962 BCA P 3318 (ASBCA 1962) (looking to the specific termination for convenience provisions of the contract to determine whether the Government could offset claimed costs for non-conforming shirts manufactured for the Government); Appeal of Atlas Can Corp., 1960 WL 244, 60-1 BCA P 2651 (ASBCA 1960) (looking to the specific provisions of the contract to determine whether offsets for excess costs of repurchase were allowable). In fact, Hobson and SE/Z have failed to acknowledge that New York Shipbuilding, the case upon which they rely in their briefing, specifically noted "that except where otherwise provided in an agreement between the parties, a termination for convenience under the Termination for Convenience of the Government clause" precludes counter-claims by the Government. New York Shipbuilding, 1972 WL 1601, 73-1 BCA P 9852 (emphasis added).

The Contract in this case does not preclude the State's claims and defenses, but instead preserves them. As in the Aydin Corp. case quoted above, the termination for convenience in

this matter involved the parties' express agreement under the Contract that no action on the part of the parties, such as termination of the Contract, would constitute a waiver of the parties' rights under the Contract. (Zambarano Aff., Ex. C, Art. 13.4.2); (see also Section B, below.) Notably, the Contract does not include any provision extinguishing the State's rights and remedies following a termination for convenience, as discussed in detail in Section B, below.

Hobson argues "[t]here is no material difference between the principle that guides the termination for convenience clause in the SE/Z—DPW contract and the principle that guides the determination to be made under the standard federal termination for convenience clause." (Hobson's Memorandum, p. 7.) To the contrary, the Contract in this matter contains only a brief payment provision with respect to termination for convenience. (Zambarano Aff., Ex. C, Art. 14.1.3, as modified by Ex. D (Supplementary Conditions to the Contract), Art. 14.1.3); (see also Section B, below.) In contrast, the termination for convenience clauses at issue in the federal cases to which Hobson and SE/Z cite involve intricate mandates of how certain costs will be calculated, references to the federal Procurement Regulations, and even provisions that a "termination settlement" must be negotiated between the parties.⁴ See, e.g., Atlas Can Corp., 1960 WL 244, 60-1 BCA P 2651. Particularly where the unique provisions of each contract can dictate the permissibility of offsets and counter-claims, these crucial differences in the contract provisions certainly equate a "material difference" between the case at hand and the ASBCA cases discussed by Hobson and SE/Z.

⁴ Hobson has argued that these completely inapplicable contract provisions should govern the manner in which it can recover costs following the termination for convenience in this case, even arguing that it is entitled to recover "unabsorbed home office overhead for government caused delays," in accordance with the federal cases. (Hobson's Memorandum, pp. 7-8.) This argument illustrates Hobson's failure to appreciate the crucial role each particular contract plays in determining the effect of a termination for convenience in a particular case. The Contract at issue in this case provides that the contractor waives its claims for "damages incurred by the Contractor for principal office expenses." (Zambarano Aff., Ex. C, Art. 4.3.9.2.)

b. *The Circumstances Do Not Justify Extinguishment of the State's Rights and Remedies*

The policy reasons articulated in those cases holding that a termination for convenience should preclude counter-claims do not apply to the case at hand. Hobson and SE/Z insinuate that the State should be precluded from raising its claims and defenses because it chose to terminate the Contract for convenience and thus somehow waived its right to pursue any claims or raise any defenses against Hobson and SE/Z. The circumstances of this case do not support a finding that the State knowingly waived its right to recover for—and to defend itself against paying for—grossly deficient work that was not reasonably discoverable by the State until after the termination, particularly with respect to a Project for which correct and conforming work was crucial to protect the safety of Boise's citizens.⁵ (*See Munio Aff.*) (discussing gross, latent defects in Hobson's work on the Project); (*Frew Aff.* ¶ 6) (noting that had Ms. Frew been aware of the extent of the latent defects present in Hobson's work, she would have been likely to recommend termination for cause.)

Furthermore, the State could not have waived its right to pursue claims and raise defenses against Hobson where it did not even terminate any contract with Hobson. Hobson entered into a Subcontract with SE/Z, (Complaint, Ex. A), under which the State was a third-party beneficiary. (*See id.*, Art. I) (providing that Hobson would perform work under SE/Z's Contract with the State); (*id.* Art. IVA) (providing that Hobson agreed "to be bound to the Contractor by the terms of the Principal Contract" between SE/Z and the State.) The State had no contract with Hobson that it could terminate; it pursues its counter-claims against Hobson on the basis of its status as an intended third-party beneficiary to Hobson's Subcontract with SE/Z. The termination for convenience provisions of the State's Contract with SE/Z are silent on the subject

⁵ In addition, as discussed in Section B, below, the Contract specifically provided that the State did not waive its right to raise its claims and defenses against Hobson and SE/Z.

of the effect of the termination on any contractual agreements SE/Z had with its subcontractors. (Zambarano Aff., Ex. C, Art. 14.4, as modified by Ex. D, Art. 14.4.) SE/Z, not the State, terminated its Subcontract with Hobson. Thus, the argument that the State somehow waived its right to raise defenses against claims brought by Hobson or waived its right to pursue claims against Hobson as a third-party beneficiary because it terminated for convenience its Contract with another party is illogical.

In addition, as in Aydin Corp., quoted above, the termination for convenience in the instant case occurred very late in Hobson's and SE/Z's performance under the Contract and Subcontract, and Hobson and SE/Z had ample time to correct any deficiencies prior to the termination. (See Hill Aff. ¶¶ 3, 8) (noting that the Project commenced in September 2003 and the termination for convenience occurred in June 2005, at which point the State believed the Project to be near completion.) Unlike the federal cases relied upon by Hobson and SE/Z, the claimed costs in this matter do not arise from—nor have any actual connection to—the termination for convenience. These are not costs stemming from work just commenced prior to termination and not yet paid for because of the termination. To the contrary, many of the issues for which Hobson now seeks payment arose long before the termination for convenience and were specifically resolved by the parties at the time they arose. (See Hill Aff., ¶¶ 4-6); (Frew Aff. ¶¶ 2-4); (Rutledge Aff. ¶¶ 2-4); (Complaint, Ex. B.) Or, Hobson's and SE/Z's claimed costs stem from long-standing payment disputes.⁶ The State's right to maintain its legal position with respect to issues previously resolved by agreement of the parties or disputes unconnected to the termination for convenience is not suddenly obliterated by the termination.

A significant portion of Hobson's and SE/Z's claimed costs relates to Hobson's claim for payment connected to the "hot gas bypass." (Complaint, Ex. B, p. 6.) This issue arose only a

⁶ SE/Z's claims for payment derive from Hobson's claimed costs.

few months into the Project and was resolved with a Construction Change Directive accepted by Hobson. (Hill Aff. ¶ 4); (Frew Aff. ¶ 2); (Rutledge Aff. ¶ 2.) Payment was made in accordance with the Change Directive and, as such, Hobson has been fully compensated on the “hot gas bypass” issue. Hobson is not entitled to “re-negotiate” an already settled payment issue. (*Id.*) Hobson also claims entitlement to payment for delay associated with inspections of the welding of the ductwork carried out in the Spring of 2004, more than a year before the termination for convenience.⁷ (Complaint, Ex. B, pp. 7-8); (Hill Aff. ¶ 6); (Frew Aff. ¶ 4); (Rutledge Aff. ¶ 2.) Again, those issues were discussed among the parties and addressed by a Change Order⁸ long before the termination. (*Id.*). Further, Hobson claims entitlement to payment arising from the belated installation of the dampers specified under the construction documents, which Hobson had initially omitted. (Complaint, Ex. B, p. 6.) A dispute with the State over whether Hobson would install the omitted dampers took place over several months, and Hobson eventually installed the missing dampers “under protest.” (Frew Aff. ¶ 5); (Complaint, Ex. B, p. 6.) The State is not arbitrarily excluded from defending itself against Hobson’s unsupported claim that it

⁷ There is a genuine issue of material fact as to whether the State owes any payment to Hobson for the issues identified by Hobson, due to the defective, non-conforming quality of the work and the fact that the State already compensated Hobson for additional work performed and time spent on the Project with respect to the issues identified by Hobson. (See Munio Aff.); (Hill Aff.); (Frew Aff.); (Rutledge Aff.). In addition, the bulk of Hobson’s claims against the State appear to be grounded on claims of “delay.” The Contract specifically provides that the Contractor may, not shall, be entitled to additional money under the Contract if the State caused the delay, and is not entitled to additional money under the Contract if the delay was caused by the Contractor or “concurrently” by the Contractor and the State. (Zambarano Aff., Ex. D, Art. 4.3.5.1.) There are genuine issues of fact regarding whether Hobson and SE/Z were responsible for the delays of which they complain. (See Hill Aff. ¶ 5); (Frew Aff. ¶¶ 3, 5-6); (Rutledge Aff. ¶¶ 5-6.) Further, any claims by the Contractor for additional costs under the Contract must be made within 21 days after the occurrence of the event giving rise to such claim, raising genuine issues as to Hobson’s failure to comply with the Contract’s time limitations for raising such claims. (Zambarano Aff., Ex. C, Arts. 4.3.2, 4.3.5, 4.3.6.)

⁸ Article 7.2.3 of the Contract provides: “Any Change Order prepared . . . constitute a final and full settlement of all matters relating to or affected by the change in the work, including, but not limited to, all direct, indirect and consequential costs associated with such change and any and all adjustments to the Contract Sum and Contract Time.” (Zambarano Aff., Ex. D, Art. 7.2.3.) Article 7.2.4 provides: “Aside from those matters specifically set forth in the Change Order, the Owner shall not be obligated to make any adjustments to either the Contract Sum or Contract Time by reason of any conditions affecting the change in work addressed by the Change Order, which could have reasonably been discovered or disclosed by the Contractor’s examination.” (*Id.* at Art. 7.2.4.)

should be paid twice⁹ for an installation specified under the construction documents that Hobson negligently failed to install and for delay caused by Hobson when it later refused to install the specified dampers. Under SE/Z's and Hobson's logic, SE/Z and Hobson could simply raise any fantastical claim for payment, and the State would be precluded from defending itself. This inequitable position is not supported by the law.

Unlike the cases to which Hobson and SE/Z cite, wherein the contractors sought reimbursement for work performed shortly before the termination for convenience and for which they never had the opportunity to address or correct issues with the quality of the work, the issues for which Hobson and SE/Z seek payment in this matter arose much earlier in the Project and were addressed by the parties at those earlier dates. (See Hill Aff. ¶¶ 4-6); (Frew Aff. ¶¶ 2-4); (Rutledge Aff. ¶¶ 2-4); (Complaint, Ex. B.) The termination for convenience should not suddenly preclude the State from defending itself against recurring payment disputes that relate back to long before the termination, particularly in the circumstances presented here, where there is a genuine issue of material fact surrounding Hobson's grossly deficient performance of the work for which it now seeks payment on a Project for which correctly executed work was extremely critical to protect the safety of employees and surrounding residents. Further, to the extent the State is entitled to liquidated damages under the Contract for delay on the Project, such damages are not subject to being "cured." Thus, any argument that such damages could have been "corrected" but for the termination for convenience is groundless.

Hobson and SE/Z have indicated that a termination for convenience should result in "payment [that] will fairly compensate the contractor." (Hobson's Memorandum, p. 7) (emphasis added) (internal quotation marks omitted). If such is the case, then the contractor

⁹ Because the dampers were included in the construction documents, Hobson was compensated for their installation under the contract price.

should not be permitted to pursue cost claims for work that is grossly deficient or for which it has already been compensated, as such payment would not serve the purpose of “fairly compensat[ing] the contractor.”

The State’s Contract with SE/Z is governed by the law of Idaho, which does not preclude offsets and counter-claims following a termination for convenience. Federal case law holding otherwise is non-binding, case-specific, and distinguishable from the case at hand, as discussed above. The law does not, as Hobson and SE/Z assert, preclude the State’s counter-claims or right to offset claimed costs in this matter.

B. SE/Z and Hobson Are Not Entitled to Summary Judgment Under the Contract

Hobson and SE/Z argue that the “plain language” of the Principal Contract entitles them to summary judgment with respect to the State’s liability to pay for work performed on the Project. However, Hobson and SE/Z are not looking to the actual language of the Contract, but are instead attempting to insert a phantom provision in the Contract precluding offset of Hobson’s and SE/Z’s claims for payment and the right of the State to raise counter-claims against Hobson and SE/Z. Nowhere in the Contract is the State’s right to offset claims or the right to raise counter-claims affected by a termination for convenience. To the contrary, the Contract as a whole demonstrates the parties’ intent to preserve rights and remedies such as those pursued by the State in this matter.

1. The Contract’s Language Does Not Support Hobson’s and SE/Z’s Position

Hobson alleges in its Memorandum that it is entitled to summary judgment on the issue of the State’s liability with respect to its third cause of action: its allegation that the State’s termination for convenience of the Principal Contract with SE/Z entitles Hobson to recover from the State, through SE/Z, “payment for work executed and for proven loss with respect to

materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.”¹⁰ (Complaint ¶ 26); (Hobson’s Memorandum, pp. 5-6.) Similarly, SE/Z alleges that it is entitled to summary judgment on the issue of the State’s liability on SE/Z’s cross-claim against the State, in which SE/Z claims entitlement to payment for work allegedly performed on the Project by its subcontractors, primarily Hobson.¹¹ (SE/Z’s Cross-Claim); (SE/Z’s Memorandum, pp. 5-8.) Both Hobson and SE/Z erroneously assert that the Principal Contract’s termination for convenience provisions automatically entitle them to summary judgment on the above issues of liability. In essence, Hobson and SE/Z contend that the language of the Principal Contract entitles them to payment, regardless of the quality of work performed or of other factual circumstances surrounding the work at issue, because the State’s termination for convenience “precluded any claims for offset” against the parties’ claims for payment. (See SE/Z’s Memorandum, p. 7.) In addition, SE/Z asserts that the language of the Contract precludes the State’s cross-claims against SE/Z. (*Id.* at 7-8.)

The General Conditions of the Prime Contract, as modified by the Supplementary Conditions, provide:

14.4.2 The Owner may, at any time, terminate the Contract for the Owner’s convenience and without cause.

14.4.3 In the case of such termination for the Owner[’s] convenience, the Contractor shall be entitled to receive payment

¹⁰ The language of the Contract does not provide for recovery of “damages” following a termination for convenience. (Zambarano Aff., Ex. C, Art. 14.1.3); (Zambarano Aff., Ex. D, Art. 14.1.3) (demonstrating that the word “damages” was removed from the provision).

¹¹ SE/Z has also brought a cross-claim against the State alleging that the State provided defective Plans and Specifications with respect to the Project. (SE/Z’s Cross-Claim.) However, SE/Z has offered absolutely no evidence—or even argument—in its Memorandum to support the contention that it is entitled to summary judgment on the issue of the State’s liability for allegedly defective Plans and Specifications. The moving party bears the burden of establishing the absence of material facts. *Quinlan*, 138 Idaho at 149. SE/Z has failed to even raise this particular issue in its Memorandum; thus, despite its broad assertion that it is entitled to “summary judgment as to liability for [all of] its cross-claims against DPW,” (SE/Z’s Memorandum, p. 4), SE/Z has failed to establish the absence of any genuine issue of material fact as to the State’s liability for allegedly defective Plans and Specifications.

from the Owner on the same basis provided in Subparagraph 14.1.3, as modified.

(Zambarano Aff., Ex. C, Arts. 14.4.2, 14.4.3, as modified by Ex. D, Arts. 14.4.2, 14.4.3.)

Notably, former Article 14.4.3 of the Contract provided for “payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.” (Zambarano Aff., Ex. C, Art. 14.4.3.) This Article was replaced with the new Article 14.4.3, quoted above, which instead refers the parties to the following provision:

14.1.3 If one of the reasons described in Subparagraph 14.1.1¹² exists, the Contractor may, upon seven days’ written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead and profit.

(Zambarano Aff., Ex. C, Art. 14.1.3, as modified by Ex. D, Art. 14.1.3) (emphasis added.) The new payment provision has limited the Contractor’s ability to recover following a termination for convenience. (Id.)

However, the payment provision is completely silent as to the State’s right to offset claims or to pursue counter-claims or offsets against the Contractor. Silence does not, as Hobson and SE/Z assert, constitute an unambiguous extinguishment of such rights, particularly in a situation where the Contract was modified to decrease the Contractor’s right to recovery after a termination for convenience. The parties clearly comprehend and know how to include

¹² Article 14.1.1 lists the reasons a Contractor may terminate the contract: (1) a stop work order by order of the court or other public authority; or (2) an act of government ordering that work be stopped. (Zambarano Aff., Ex. C, Art. 14.1.1, as modified by Ex. D, Art. 14.1.1.) In other words, the payment provision additionally applies to situations in which the Contractor terminates the Contract due to no fault of the State. (Zambarano Aff., Ex. C, Art. 14.1.3, as modified by Ex. D, Art. 14.1.3.) It is illogical to assert that the plain language of Article 14.1.3 extinguishes the State’s right to offset a Contractor’s claims for work performed or to raise counter-claims for defective work, breach of contract, and the like when the Article also extends to situations where the State had no hand at all in the termination.

limitation language,¹³ and there is no such language in the termination for convenience clause. Despite Hobson's and SE/Z's attempt to transform silence into a provision curtailing the State's right to offset claims or to pursue its own claims following a termination for convenience, no such provision exists in the Contract.

2. The Contract's Language Instead Protects the State's Right to Offset Claims and Raise Counter-Claims

Hobson and SE/Z argue that the Contract unambiguously precludes the State's right to offset Hobson's and SE/Z's claims or to raise counter-claims against them. "In determining whether a contract is ambiguous, this Court ascertains whether the contract is 'reasonably subject to conflicting interpretation.'" McKay v. Boise Project Bd. of Control, 141 Idaho 463, 111 P.3d 148, 156 (2005), quoting Bondy v. Levy, 121 Idaho 993, 996, 829 P.3d 1342, 1345 (1992). "If [] the contract is determined to be ambiguous, 'the interpretation of the document is a question of fact which focuses upon the intent of the parties.'" McKay, 141 Idaho 463, 111 P.3d at 156 (emphasis added), quoting Albee v. Judy, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001). The Contract's complete silence on the issues of offset and counter-claims in the provisions related to termination for convenience, is, at the most, an ambiguity constituting a genuine issue of material fact with respect to the intent of the parties. Id.

However, when the Contract is read as a whole, the State's ability to pursue counter-claims and to offset claims made against it by Hobson and SE/Z is clear. See Shawyer v. Huckleberry Ests., LLC, 140 Idaho 354, 361, 93 P.3d 685 (2004) ("In determining the intent of the parties, this Court must view the contract as a whole."); see also Selkirk Seed Co. v. State Ins. Fund, 135 Idaho 434, 18 P.3d 956 (2000) (same). Article 13.4.1 of the Contract explicitly provides: "Duties and obligations imposed by the Contract Documents and rights and remedies

¹³ (See, e.g., Zambarano Aff., Ex. C, Arts. 4.3.10, 9.10.4) (providing for explicit limitations on rights under the Contract).

available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.” (Zambarano Aff., Ex. C, Art. 13.4.1) (emphasis added). Article 13.4.2 provides: “No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.” (Id. at Art. 13.4.2.) The above two Articles clearly provide: (1) that silence in the Contract as to the State’s rights to pursue claims or remedies “otherwise imposed or available by law” is not to be construed as a limitation upon or extinguishment of such right; (2) that the State’s action of terminating the Contract for convenience did not constitute a waiver of its rights under the Contract; and (3) that the State’s termination of the Contract for convenience did not constitute acquiescence to any breach under the Contract. (Id. at Arts. 13.4.1, 13.4.2.) This is particularly true with respect to the State’s claims and defenses against Hobson, given that the State did not even terminate for convenience any contract with Hobson, but instead bases its claims against Hobson on its status as an intended third-party beneficiary of Hobson’s Subcontract with SE/Z. The Contract’s terms are “not a limitation of . . . rights and remedies otherwise imposed or available by law” with respect to an entity that was not even a party to the Contract or a subject of the State’s termination of that Contract. (Zambarano Aff., Ex. C, Art. 13.4.1) (emphasis added).

In addition to the above clear provisions of the Contract, the Contract as a whole demonstrates the parties’ intent to only limit the parties’ rights under the Contract by means of a clear, written waiver, in accordance with Article 13.4.2. Waivers of any rights under the Contract are explicitly set forth in the Contract. (See, e.g., Zambarano Aff., Ex. C, Art. 4.3.10) (including an explicit waiver of claims for consequential damages, providing: “This mutual

waiver is applicable, without limitations, to all consequential damages due to either party's termination [of the Contract.]"); (Zambarano Aff., Ex. C, Art. 9.10.4) (explicitly providing that "final payment shall constitute a waiver of Claims by the Owner," though the waiver does not extend to claims "arising from . . . failure of the Work to comply with the requirements of the Contract Documents; or terms of special warranties required by the Contract Documents.")¹⁴ There has been no such explicit, written waiver of the State's rights and remedies following the termination for convenience, either within the Contract or otherwise. In fact, in its Notice of Termination, the State specifically stated: "[A]s I believe you are aware, there have been significant delays and added costs associated with this project. This termination is not, and shall not be deemed as, a waiver of any rights we may have with regard thereto." (Zambarano Aff., Ex. E ("Notice of Termination").)

Hobson and SE/Z's argument that the State cannot convert a termination for convenience into a termination for default is misleading and continues to ignore the clear language of the Contract, as well as the State's reservation of its rights in its Notice of Termination. (See id.); (Zambarano Aff., Ex. C, Arts. 13.4.1, 13.4.2.) According to the plain language of the Contract, the manner of termination of the Contract did not affect the State's contractual rights. (Id.) Thus, there is no reason the State need "convert" its termination into a termination for default. The State chose to terminate the Contract for convenience, an appropriate and permissible manner of termination. (Zambarano Aff., Ex. C, Art. 14.4.2, as modified by Ex. D, Art. 14.4.2) (providing that the State "may, at any time, terminate the Contract for [its] convenience and without cause" and remaining significantly silent on the issue of any effect on the State's rights under the

¹⁴ "Final payment" did not occur in this case, as it can only be made upon completion of the Project and acceptance of the work by the architect, neither of which occurred prior to the termination for convenience. (Zambarano Aff., Ex. C, Art. 9.10.1, as modified by Ex. D, Art. 9.10.1.).

Contract following such a termination.) The characterization of the termination does not subsume the State's other rights under the Contract following the termination.

The Contract, when viewed as a whole, clearly provides for the State's ability to pursue rights and remedies afforded under the Contract or common law and clearly indicates that the State did not waive such rights upon the termination for convenience.

3. The Contract and Applicable Law Provide for the State's Specific Claims

The State's right to offset Hobson's and SE/Z's claims and to pursue the claims raised by the State against Hobson and SE/Z are permissible under the Contract and common law. In other words, the claims and defenses asserted by the State in this matter are the type of "rights and remedies otherwise imposed or available by law" that the State is permitted to pursue. (Zambarano Aff., Ex. C, Art. 13.4.1.) Besides its affirmative defense of the right to offset Hobson's and SE/Z's claimed costs, the State has also raised the following claims: (1) against Hobson: breach of contract, breach of warranty, indemnification, and contribution; and (2) against SE/Z: breach of contract, breach of warranty (both express and implied), breach of the duty of good faith and fair dealing, indemnification, and contribution. The above claims are common causes of action recognized under Idaho law. Several of the claims are even explicitly recognized within the Contract.

1. The State's Claims Against Hobson

As discussed above, the State raises its claims against Hobson based upon its status as a third-party beneficiary of Hobson's Subcontract with SE/Z. Under its Subcontract, Hobson was obligated to perform work under SE/Z's Contract with the State and to be bound to SE/Z by the terms of the Principal Contract. (Complaint, Ex. A, Arts. I, IVA.)

There is a genuine issue of material fact with respect to the gross deficiency of Hobson's work under the Subcontract. (See Section C, below); (Munio Aff.) The State asserts that Hobson breached the Subcontract by performing defective work and failing to conform with the terms and Plans and Specifications of the Contract, as Hobson was required to do under the Subcontract. (Complaint, Ex. A, Art. IVA.) Hobson also breached the Subcontract by refusing to correct defective work upon demand. (Id. at Art. VIII) (providing that Hobson was "obligated upon demand by the Contractor to remedy any defects in its work"); (Frew Aff. ¶ 5) (noting that Hobson delayed the Project by refusing to install dampers specified under the construction documents.)

In addition, there is a genuine issue of material fact with respect to Hobson's cause of delay on the Project. (See Section C, below.) The State asserts that Hobson breached the Subcontract by failing to "commence the work to be performed hereunder as scheduled by the Contractor and [] thereafter prosecut[ing] the same diligently . . . and strictly in accordance with the Contractor's construction schedule." (Complaint, Ex. A, Art. II.) The State is even entitled to liquidated damages in the amount of \$250 per day "for each calendar day of delay in completion of all contract work . . ." (Id.)

In addition, Hobson has breached warranties contained in the Contract, including its warranty that it would "complete the work required in coordination with . . . good construction procedures." (Id.); (see Munio Aff. ¶¶ 4, 6, 13) (noting that Hobson's work on the Project was not in accordance with good construction practices.) Hobson was also obligated to comply with the express warranty contained in the Principal Contract:

Art. 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract be of good quality . . . , that the Work will be free from defects . . . , and that the Work will conform to the requirements of the Contract

Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.

(Zambarano Aff., Ex. C, Art. 3.5.1) (emphasis added); (Complaint, Ex. A, Art. IVA) (providing that Hobson was bound by the terms of the Principal Contract). There is a genuine issue of material fact regarding whether Hobson breached the above express warranties by providing poor material, performing defective work, and performing work that failed to conform to the Contract Documents. (See Section C, below.)

With respect to the State's indemnification and contribution claims against Hobson, the Subcontract provides:

Art. IX(a) To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor, Owner and its agents, invitees and other employees, from and against all claims, damages, losses and expense, including but not limited to attorneys' fees, arising out of or resulting from Subcontractor's performance of its work under the Principal Contract.

(Complaint, Ex. A, Art. IX(a)) (emphasis added). It further provides that Hobson "agrees to hold the Owner . . . harmless from any and all accidents, damages, liens, suits, judgments and any and all matters of action resulting from the Subcontractor's breach of the said Subcontract, and from the Subcontractor's negligence or failure fully to perform said Subcontract work." (Id. at Art. IX) (emphasis added). As stated previously, there are genuine issues of material fact surrounding Hobson's breach of the Subcontract and its negligence and failure to fully perform its work on the Project.

The Subcontract clearly provides for the State's claims against Hobson.

2. The State's Claims Against SE/Z

The State has raised claims against SE/Z of breach of contract, breach of warranty (express and implied), breach of the duty of good faith and fair dealing, indemnification, and contribution. As with the State's claims against Hobson, many of the claims against SE/Z are expressly provided for within the State's Contract with SE/Z.

The Contract provides that SE/Z is responsible for the acts and omissions of its subcontractors. (Zambarano Aff., Ex. C, Art. 3.3.2.) Thus, Hobson's breaches of the Subcontract and of the terms of the Principal Contract are SE/Z's direct responsibility. The State asserts that SE/Z has further breached the following provision of the Contract, which mandates:

3.4.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

(Zambarano Aff., Ex. C, Art. 3.4.2) (emphasis added). A genuine issue of material fact surrounds the question of whether SE/Z failed to enforce good order by allowing the ongoing disputes and delays on the part of Hobson to occur and permitted the employment of "unfit persons" when it retained Hobson, who performed defective, non-conforming work. (Hill Aff. ¶ 7.)

With respect to the State's breach of warranty claims against SE/Z, as quoted above, the Contract contains an express warranty "that materials and equipment furnished under the Contract [will] be of good quality . . . , that the Work will be free from defects . . . , and that the Work will conform to the requirements of the Contract Documents." (Zambarano Aff., Ex. C, Art. 3.5.1.) A genuine issue of material fact exists as to the quality of Hobson's work and the

material used and conformance of the work with the Contract Documents. (See Section C, below.) SE/Z is responsible for Hobson's deficient work. (Zambarano Aff., Ex. C, Art. 3.3.2.)

The Contract additionally provides for liquidated damages in the amount of \$250 "for each calendar day of delay until the Work is substantially completed," noting that the State "will suffer financial loss in an amount that is difficult to quantify if the Project is not Substantially Complete on the date set forth in the Contract Documents." (Zambarano Aff., Ex. D, Art. 9.11.1.) These liquidated damages are not specifically limited to delays caused by the Contractor or a subcontractor. (See id.) Even if they were, a genuine issue of material fact exists regarding whether Hobson and SE/Z were responsible for the delays occurring on the Project, delays that extended the Project for more than a year past the Project's anticipated completion date of May 2004. (Hill Aff. ¶ 5); (Frew Aff. ¶¶ 3, 5-6); (Rutledge Aff. ¶¶ 5-6); see also Timberland Paving and Constr. Co. v. The United States, 18 Cl. Ct. 129, 141 (Cl. Ct. 1989) (holding that the federal Government's offset for liquidated damages against a contractor's claimed costs was allowable following a termination for convenience); (Zambarano Aff., Ex. C, Art. 4.3.10) (noting that waiver of consequential damages under the Contract does not extend to liquidated damages.).

With respect to the State's claims for breach of the implied warranty of workmanship, breach of the duty of good faith and fair dealing, indemnification, and contribution, these causes of action are recognized under the common law, and substantial evidence exists to support the State's allegations that Hobson's work on the Project was grossly deficient, thus giving rise to such claims against SE/Z, who was responsible for Hobson's acts and omissions.¹⁵ (Munio Aff. ¶¶ 4-11, 12-13 and Ex. B); (Frew Aff. ¶ 7); (Rutledge Aff. ¶ 7); (Hill Aff. ¶ 9); (Zambarano Aff., Ex. C, Art. 3.3.2.)

¹⁵ As mentioned previously, SE/Z is responsible, under the Contract, for the work of its sub-contractor, Hobson. (Zambarano Aff., Ex. C, Art. 3.3.2.)

3. The State's Right to Offset Hobson's and SE/Z's Claims

The State is additionally entitled under the Contract to offset Hobson's and SE/Z's claimed costs. The issue of offset is addressed in Article 12.3.1 of the Principal Contract, which provides that if the State chooses to accept work not in accordance with the requirements of the Contract, rather than requiring removal or correction of the work, "the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made." (Zambarano Aff., Ex. C, Art. 12.3.1.) (emphasis added). To the extent Hobson and SE/Z argue that the termination for convenience was an "acceptance" of any non-conforming work under the Contract, the State is clearly entitled under Article 12.3.1 to an offset of the claimed costs. If the termination for convenience is not deemed an "acceptance" of such work, then Hobson's and SE/Z's insinuation that the State has waived its rights to offset costs and raise counterclaims is baseless.

The potential for offset is further addressed in the Contract's and Subcontract's liquidated damages provisions, discussed above. (Zambarano Aff., Ex. D, Art. 9.11.1); (Complaint, Ex. A, Art. II.) Any claimed costs may be reduced by liquidated damages owed to the State due to the delay of the Project. (*Id.*); Timberland Paving and Constr., 18 Cl. Ct. at 141 (holding that an offset of the contractor's claimed costs for liquidated damages the contractor owes under the contract is permissible after a termination for convenience.)

Additionally, the State is entitled to defend against Hobson's and SE/Z's claimed costs on the basis that such claims did not comply with the notice provisions of the Contract and Subcontract. Under the Subcontract, Hobson was obligated "to make all claims for extras, for extensions of time, and for damages, delays or otherwise, if any, to the Contractor" within ten days. (Complaint, Ex. A, Art. IVA.) "By failing to provide proper notification of Claims and/or

request for contract adjustment within the specified time period [of 10 days], the Subcontractor waives all rights for same. (*Id.*) Similarly, the Contract provides that claims for additional cost or time under the Contract must be made by SE/Z “within 21 days after occurrence of the event giving rise to the Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.” (Zambarano Aff., Ex. C, Art. 4.3.) Thus, to the extent Hobson’s and SE/Z’s claims were raised outside the time period prescribed in the Contract and Subcontract, the State is entitled to raise Hobson’s and SE/Z’s failure to comply with the notice provisions as a defense to their claims.

In sum, the State is entitled to raise its claims and defenses in this matter against Hobson and SE/Z, as they are rights and remedies provided for under the Contract, Subcontract, and the common law, and thus are explicitly preserved under the parties’ express agreement. (Zambarano Aff., Ex. C, Arts. 13.4.1, 13.4.2.)

4. Hobson and SE/Z Are Not Entitled to Summary Judgment on the Basis of the Contract Language

Rather than unambiguously providing that the State cannot pursue its claims and offsets against Hobson and SE/Z, the Contract instead clearly provides that the State can do so.¹⁶ At the most, the issue of whether the State can pursue its claims and offsets against Hobson and SE/Z involves an ambiguity with respect to the intent of the parties, precluding Hobson’s and SE/Z’s motions for summary judgment. *See McKay*, 141 Idaho 463, 111 P.3d at 156.

¹⁶ To the extent Hobson and SE/Z have attempted to separate the issue of the amount of money owed by the State from the issue of the State’s liability for making such payments, the two issues are inextricably intertwined in this matter. The State contends that it is not responsible for any of Hobson’s and SE/Z’s claimed costs for several reasons, with the State’s right to offset such claims constituting only one of the defenses to liability raised by the State in its Answers. Hobson and SE/Z have ignored the remainder of the defenses raised by the State, neglecting to meet their burden of establishing the lack of any genuine issue of material fact with respect to those defenses. *Quinlan*, 138 Idaho at 149.

C. **The Deficiency of Hobson's Work Gives Rise to the State's Right to Pursue its Claims and Defenses Against Hobson and SE/Z**

Even if the general federal case law to which Hobson and SE/Z cite were binding or applicable, which it is not, there still exists a genuine issue of material fact as to whether the work for which Hobson and SE/Z claim payment was grossly deficient or in gross disregard of their contractual obligations. Even under the strictest federal cases dealing with termination for convenience, the case law has held "that alleged deficiencies stemm[ing] from gross disregard by appellant of its contractual obligations [and] the costs of performing such grossly deficient work would be considered unreasonable and hence unallowable" following a termination for convenience. See, e.g., New York Shipbuilding, 1972 WL 1601, 73-1 BCA P 9852; Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). Under such cases, the costs of performing work are not allowable where "the government established that any defects resulted from [the contractor's] gross disregard of its contractual obligations or that any defects are so extensive as to render [the contractor's] costs unreasonable." Best Foam Fabricators, Inc. v. United States, 38 Fed. Cl. 627, 641 (Fed. Cl. 1997). Even the case upon which Hobson and SE/Z most heavily rely in their Memoranda, New York Shipbuilding, provides for an exception allowing for offset when "it is established that the defective production resulted from the contractor's own fault or folly or careless conduct of the work or other disregard of his contractual duties." New York Shipbuilding, 1772 WL 1601, 73-1 BCA P 9852. The same reasoning must apply to affirmative claims stemming from such grossly deficient, unreasonable, grossly non-conforming, and extensively defective work. See E.A. Cowen Construction, 1966 WL 651, 66-2 BCA P 6060.

In E.A. Cowen Construction, Inc., 1966 WL 651, 66-2 BCA P 6060, the Board of Contract Appeals held that the Government could recover against a contractor by counter-claim

sums for the repair of a roof that had collapsed due to the contractor's deficient workmanship, holding that the contractor could not escape the consequences of its own deficiencies merely because of the termination for convenience. In that case, the faulty workmanship was so egregious that recovery by counter-claim was warranted, even under the conservative federal view of terminations for convenience. As in E.A. Cowen Construction, there is a genuine issue of material fact regarding Hobson's workmanship on the Project, which the State asserts was so grossly deficient as to render its claimed costs unreasonable and to warrant counter-claims by the State to recover for the extensive repairs that must be conducted in order to rectify the faulty work performed by Hobson.

Hobson and SE/Z have not addressed at all in conjunction with their Motions the substance or merit of their payment claims or of the State's counter-claims. Hobson and SE/Z bear the burden of proving their claims for payment against the State. See Appeals of D.E.W., Inc. and D.E. Wurzbach, a Joint Venture, 2000 WL 1337242, 00-2 BCA P 31104 (ASBCA 2000); (Zambarano Aff., Ex. C, Art. 14.1.3, as modified by Ex. D, Art. 14.1.3) (allowing recovery for certain proven losses). Further, Hobson and SE/Z bear the burden of establishing that no genuine issue of material fact exists as to their entitlement to recover such costs. Quinlan, 138 Idaho at 149. Under even the most conservative approaches to payment following terminations for convenience, the common law dictates that the contractor is not entitled to recover costs if the work was grossly deficient or in gross disregard of the contractor's contractual obligations and that the State is entitled to recover via counter-claim with respect to grossly defective work; thus, to support their Motions for summary judgment, Hobson and SE/Z must establish that no genuine issue exists as to the quality of the work at issue. They cannot do so.

make any adjustments to either the Contract Sum or Contract Time by reason of any conditions affecting the change in work addressed by the Change Order, which could have reasonably been discovered or disclosed by the Contractor's examination." (emphasis added). Many of the circumstances for which Hobson and SE/Z claim additional costs were settled long ago by the issuance of Change Orders. (Complaint, Ex. B, pp. 7-8); (Hill Aff. ¶¶ 4, 6); (Frew Aff. ¶¶ 2, 4); (Rutledge Aff. ¶ 2.) Thus, further adjustments to the contract price for those issues are not compensable under the Contract. (Id.)

In addition to the above, several federal cases have held that an "adjustment for loss" must be applied to any claim for payment for work performed following a termination for convenience "if it is determined that the contract would have been completed at a loss." Appeals of Alfair Development Co., Inc., 2005 WL 1385131, 05-2 BCA P 32 (ASBCA 2005); Balimoy Mfg. Co. of Venice, Inc., 98-2 BCA P 30 (ASBCA), aff'd 243 F.3d 561 (Fed. Cir. 2000). In Alfair, the Board of Contract Appeals held that "[a] limitation on recovery is set by the contract price," so that if the Government has already reimbursed the contractor in excess of the contract price, no further costs are allowed. Alfair, 2005 WL 1385131, 05-2 BCA P 32. A genuine issue of material fact exists regarding whether Hobson's and SE/Z's claimed costs exceed—and are thus limited by—the contract price, given that the Contract was not terminated until the Project appeared to be 90% complete and that it will cost over a million dollars to repair and complete work for which Hobson was initially supposed to receive only \$657,500. (Frew Aff. ¶ 6); (Hill Aff. ¶¶ 7-8); (Rutledge Aff. ¶ 6); (Munio Aff. ¶¶ 3, 13); (Complaint, Ex. A, Art. I.)

D. Conclusion

Hobson and SE/Z have focused solely on an absence of language in the Contract and on non-binding, distinguishable federal law for their contention that they are entitled to summary

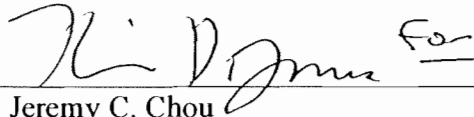
judgment with respect to the State's liability for its claimed costs on the Project and with respect to the State's counter-claims against Hobson and SE/Z. In doing so, Hobson and SE/Z have attempted to portray the situation as a simple and unambiguous legal matter. However, the Contract does not provide that which Hobson and SE/Z assert. Instead, the language of the Contract provides that the State's right to assert its claims and defenses against Hobson and SE/Z remain intact. At most, the Contract's language is subject to differing interpretations, giving rise to a genuine issue of fact with respect to the parties' intent.

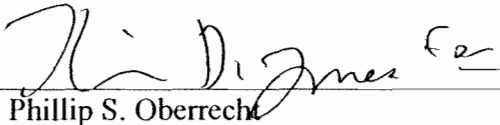
Neither is the federal law cited by Hobson and SE/Z the type of well-established, binding, or highly persuasive legal authority warranting dismissal of the State's claims and defenses as a matter of law. Each case is specific to the contract at issue, and many cases have held that the Government is not precluded from pursuing offsets or counter-claims. Even were this Court to take such cases into account, the same legal authority mandates that Hobson and SE/Z cannot recover for any costs stemming from grossly deficient work, work performed in gross disregard of the Contract, or costs incurred in excess of the contract price. Hobson and SE/Z have not addressed the merits of their claimed costs, and a genuine issue of material fact exists as to whether such costs are allowable under the legal authority upon which Hobson and SE/Z rely.

Summary judgment is not warranted in this case. For the above reasons, the State respectfully requests that this Court deny Hobson's and SE/Z's Motions for Partial Summary Judgment.

DATED this _____ day of May, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May, 2006, I caused to be served a true copy of the foregoing DEFENDANT STATE OF IDAHO'S OPPOSITION TO HOBSON FABRICATING CORP.'S AND SE/Z CONSTRUCTION, LLC'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

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W:\11-194.55\MSJ Opp.--Hill Aff..doc

Attorneys for Defendants State of Idaho, Ken Gardner, David Rooke,
Jan Frew, Larry Osgood, Chris Motley, and Elaine Hill

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho corporation,)	
	)	Case No. CV OC 0508037
)	
Plaintiff,	)	[Consolidated with Case No.CV OC 06-
v.	)	00191]
)	
SE/Z CONSTRUCTION, LLC, an Idaho limited liability company; and STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)	
	)	AFFIDAVIT OF ELAINE HILL IN
	)	SUPPORT OF DEFENDANT STATE
	)	OF IDAHO'S OPPOSITION TO
	)	HOBSON FABRICATING CORP.'S
Defendants,	)	AND SE/Z CONSTRUCTION, LLC'S
	)	MOTIONS FOR PARTIAL SUMMARY
	)	JUDGMENT

COPY

NO. _____
FILED
A.M. _____ P.M. _____

MAY 22 2006

J. DAVID NAVARRO, Clerk
By M. SHAPOL
DEPUTY

COPY

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant,

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter-Cross-Defendant.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works

Third-Party Plaintiff,)
v.)
RUDEEN & ASSOCIATES, A)
PROFESSIONAL COMPANY, an Idaho)
limited liability company,)
Third-Party Defendant.)

HOBSON FABRICATING CORP., an Idaho)
corporation,)
Plaintiff,)

v.)
KEN GARDNER, an individual; DAVID)
ROOK, an individual; JAN FREW, an)
individual; LARRY OSGOOD, an individual;)
CHRIS MOTLEY, an individual; and ELAINE)
HILL, an individual,)
Defendants,)

Case No. CV OC 06-00191

STATE OF IDAHO)
County of Ada) ss.

ELAINE HILL being first duly sworn upon oath, deposes and states as follows:

1. I am an architect employed with the State of Idaho, Department of Administration, Division of Public Works ("DPW"), and I served as the Project Manager for "DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3" ("the Project"). In my position as Project Manager for the Project, I worked throughout all stages of the Project to ensure that the goals of the Department of Health and Welfare would be met and that the contractors performing the work on the Project did so in accordance with the construction documents.
2. The Project, once completed, was intended to serve as a level 3 bio-safety laboratory

capable of handling dangerous substances such as anthrax or avian flu virus. The mechanical portion of the Project is a critical aspect. The mechanical subcontractors were pre-qualified prior to bidding the mechanically intensive project. Dangerous substances may be released into the laboratory and the atmosphere, endangering employees of the laboratory, as well as citizens in the surrounding area, if the mechanical system does not operate correctly to filter and capture the substances. Thus, conformance with the contract specifications was particularly crucial in this Project.

3. The Project commenced in approximately September 2003, with an anticipated date of completion of May 26, 2004. SE/Z Construction, LLC ("SE/Z") was the general contractor on the Project, while Hobson Fabricating Corp. ("Hobson") served as the mechanical sub-contractor.

4. In approximately September or October 2003, an issue arose with the 6-stage compressor specified in the contract documents, as the unit was not available on the market. A Construction Change Directive #01, dated November 21, 2003, was issued to SE/Z and accepted compensating SE/Z in an amount above the original contract price for its subsequent construction of a hot gas bypass system in place of the units initially specified in the contract documents. SE/Z's signing of the CCD-01 on November 25, 2003 incorporating it into the construction contract.

5. In approximately January 2004, I was present at the site of the Project when Traci Hanegan, an engineer with Coffman Engineers, was concerned over an ASTM number of a fitting that Hobson was to install. After confirming the ASTM number in her office, Ms. Hanegan discovered Hobson had been using "316" stainless steel with respect to the exhaust ductwork. The contract documents specified that Hobson was to utilize "316L" stainless steel,

but Hobson instead installed inferior “316.” The price and quality discrepancy between “316” and “316L” is significant. Hobson had rolled the stainless steel exhaust ductwork with the label concealed on the inside. When confronted, Hobson blamed the mistake on its back room. Although Hobson removed the non-conforming steel after Ms. Hanegan rejected it, a delay of approximately six weeks resulted while Hobson waited for delivery of the correct material. Hobson’s attitude after this incident shifted noticeably, as Hobson’s profit margin was accordingly reduced by approximately \$60,000, by first installing the “316” steel exhaust ductwork, removing the “316” steel exhaust ductwork, and installing the 316L steel exhaust ductwork. From that point forward, Hobson demonstrated a reluctance to complete the Project.

6. In approximately May 2004, DPW retained a third-party welding inspector, Mark Bell, to visually inspect the welding performed on the Project by Hobson. Mr. Bell identified numerous welding defects. Defects of this nature in the ductwork increased the likelihood of the release of dangerous substances into the atmosphere if the laboratory were put into operation. Hobson agreed to correct approximately one third of the identified welds. DPW decided to tighten the welding specifications, thus issuing a Change Order to Hobson and compensating Hobson for additional corrective work to a higher welding criteria than originally specified. However, when Mr. Bell returned to inspect the welds in August 2004, he identified numerous welds that still did not meet the specifications. Attached hereto as Exhibit “A” is a true and correct copy of the Report I received from Mr. Bell regarding his May 2004 and August 2004 inspections of the welds.

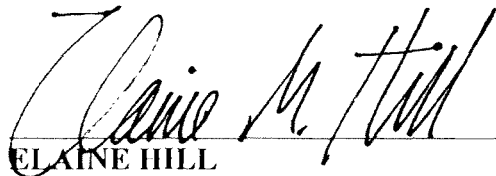
7. In approximately the Spring of 2005, DPW discovered that Hobson had not installed dampers that were clearly called for in the contract documents and were necessary for the safe and correct operation of the facility’s exhaust system and sanitizing of the BSL-3 lab.

DPW required Hobson to install the dampers, but this incident further delayed the Project. By that point in time, the Project was already a year behind schedule, and Hobson seemed to be instigating endless disputes and issuing numerous duplicative requests for information, preventing the Project from moving forward. In addition, SE/Z had failed to appropriately manage the Project by keeping the Project on schedule.

8. Finally, in June 2005, DPW decided to terminate its contracts with SE/Z and with the architect/engineer for convenience. At the time of the termination for convenience, DPW believed that the Project was 90% complete and would only require \$100,000 to reach completion. DPW was unaware of most of the visually concealed problems with Hobson's completed mechanical work at the time of the termination. These problems were confirmed in a Report issued by Washington Group International ("Washington Group.")

9. In approximately July 2005, DPW retained Washington Group to inspect the completed work on the Project and to render its opinion regarding measures still needed to bring the Project to completion. The Report issued by Washington Group revealed gross deficiencies in the mechanical work completed by Hobson and further revealed that the State will need to expend well over one million dollars to complete the Project, as much of the mechanical work must be replaced. To date, the Project has not yet been completed.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ELAINE HILL

SUBSCRIBED AND SWORN TO before me this 22ND day of May, 2006.



Susan Drummond-Reeves
Notary Public for Idaho
Residing at ADA County, Idaho
Commission expires: 11.23.11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May, 2006, I caused to be served a true copy of the foregoing AFFIDAVIT OF ELAINE HILL IN SUPPORT OF DEFENDANT STATE OF IDAHO'S OPPOSITION TO HOBSON FABRICATING CORP.'S AND SE/Z CONSTRUCTION, LLC'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

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Thomas A. Larkin
Stewart Sokol & Gray, LLC
2300 SW First Avenue, Suite 200
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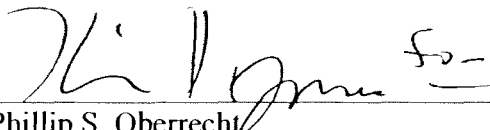
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Phillip S. Oberrecht

EXHIBIT A

Report from Welding Expert Inspector Mark Bell

Report on August 3 to 5 Inspection
Stainless Steel Ducting

Dear Ms Hill,

This is the report on the visual inspection of both the remainder of the BSL's stainless steel ducting and a reinspection of the marked welds from the May 2004 inspection.

REINSPECTION OF MAY INDICATIONS

The results of the reinspection of the May welds are presented in Table 1, conducted on August 3, 2004. It is my opinion that the effort to actually repair the called, especially critical welds, is marginal. There was not a serious effort to address the problem of through wall thickness porosity. Also the welds on the segmented 45-degree section, which was installed recently, were inspected. The most serious defect was a deep cut in the base metal from the removal of the original 45-degree elbow. My expert opinion is based on my experience in welding and inspecting stainless steel sheet. I have continued to inspect the welds in a consistent manner with the intent to minimize through wall defects.

INSPECTION OF ROOF AND REMAING WELDS

Table 2 presents the results of my inspection on August 4 and 5, 2004. There are significant runs of ducting which are not accessible for inspection.

THROUGH WALL LEAKS

My inspection focused on the welding defects that would affect the integrity of the ventilation system due to through wall leaks. Therefore indications of lack of fusion, cracks and crater cracks were given the most attention as these could be through wall. When an indication could be masked due to overlap or excessive crown then the indication of overlap or excessive crown was called. I called pits and porosity as needing repairs only when there was a possibility of a through wall defect. If there could have been a high level of confidence that these would not be through wall leaks then they would not have been called. In the same manner crater cracks were only called when I thought there was a possibility of a through wall defect. There were many areas where the crater crack and shrinkage was hand ground to a size less than 1/32 inch in length. This clearly cannot be counted as an acceptable indication since it originally was a crater crack or was greater than 1/32 inch in length. It is certainly not acceptable industry practice to grind an unacceptable crack or pit to a smaller dimension and expect it to be acceptable. If after grinding a crater crack there is still an indication, (even though less than 1/32 inch in length) it is possible that it is through wall and therefore unacceptable. In my experience in welding stainless steel sheet it is possible, even likely, to have through wall defects due to lack of fusion and crater cracks; that is the reason I have been cautious about these indications. If I did not think an indication was through wall it was not called. It was for that reason that there were many small crater cracks and shrinkage

that I did not call. The general workmanship of the mismatch and uneven welds were not addressed in my inspection, even though they would not be considered to be to good industry practice. They are not likely to directly leak.

LEAK TESTING BOX

I have found a source for a vacuum leak tester which may be used on this project to clear up the question if an indication is through wall or not. A small diameter (4 to 6 inches) device can be made to fit the contour of the ducting and also accommodate the roughness from welding and mismatch. A non-foaming soap is used to indicate the presence of a through wall leak when a vacuum is drawn on the box. These are used in industry to detect leaks in the weld seams of linings of exhaust stacks in power plants. This is not excessively stringent as in detecting parts per million of helium in nuclear plants. Instead it is reasonable in its sensitivity, which can be adjusted, to give a go/no go decision-making process in addressing the relevant indications. It is fast. If there is not indication of a leak then I would not want to grind or conduct any other repairs. It passed the leak test, accept the results and move on with confidence that the indications will not leak.

REPAIR PROCEDURE

Presently there is not a good method for repair. There are too many areas that need repair to allow a localized weld without proper protection of the root with an inert gas as described in the contract. There is extensive grinding on called areas, some of which still indicates a through wall defect, which may require welding to build up the wall to an acceptable thickness. I can only recommend that the root be properly shielded by argon, do not allow localized welding without root protection.

THE PROBLEM OF THIN WALL REQUIREMENTS

Grinding, fabrication problems and thin butt welds are possible problems as the thin material may not be able to support the loading of the ducting. It is agreed that the magnitude of mechanical loading of the ducting is very small due to the pressure differential of the operating system. The problem is that there is more to the loading than just the operation of the exhaust. The residual stress due to the welding is significant (a high percentage of the yield strength of the material), the cyclic loading due to temperature fluctuations, the weight of the ducting itself adds to the loading on the welds, and also from unknown, unforeseen loadings. These are additive and may result in fatigue cracking in the future. I do not recommend that the possibility of fatigue loading on the ducting be discounted. Some areas of thin material will need to be built back up. A good example of this is in the reinstallation of the segmented elbow in place of the 90-degree elbow. The base metal was severely cut into when the repair was made. This cannot be allowed to remain. Hobson was shown the area and is aware that it is significantly thin.

INSPECTING TO AWS D 9.1

If AWS 9.1 Sheet Metal Welding Code is used for the fabrication and inspection of these welds then I need to add some comments. First of all you cannot pick and choose which section of this code you want to use. One example is that the contractor has never inspected the welds as required in Section 6. Hobson never inspected the welds in their shop or in the BSL. They did not inspect the repairs I called in May of this year.

It is clear that Section 6.5 allows some porosity or inclusions. If these are not through wall I have no problem with allowing porosity or inclusions. But, if it cannot be determined what the extent of the wall the porosity extend into then these have to be called and repaired. Through wall defects are not to the level of workmanship needed for the BSL. AWS D9.1 allows porosity no larger than 0.5t. It would be reasonable to allow the repair of porosity whose size is less than 0.5t to be covered by a change order. The great majority of what is now called porosity has been ground on, which results in the removal of the original crater crack. There are many indications whose present size is less than 1/32 inch but which were once larger or were the bottoms of crater cracks. A ground crater crack to a porosity indication less than 0.5t should be necessarily be covered by a change order.

Some pertinent sections of the welding requirements of AWS D9.1 are attached to this report.

RECOMMENDATIONS

1. The use of the vacuum leak detection boxes can clarify the issues of this project. It is a fast sure method of inspection. The geometry of most of the indications can be inspected with this method. The inside of Y's and similar areas may require some modification of the boxes. The boxes are approximately \$400.00 each. A vacuum pump and hoses are needed, also the special non-foaming soap.
2. Having me onsite to accept the repaired areas can speed up this repair process. I can keep 2 or 3 teams of repair busy. Hobson does not have the credibility to be allowed to do the inspection.
3. The welding of the defects and the thin areas will have to be done with a proper protective inert gas on the roots.

Sincerely,

Mark D. Bell, P.E.
Metallurgical Engineer

MDB

TABLE 1
August 3 of reinspection of BSL welds called in May 2004.

Repair/ Reference Number	LOCATION	Duct Diameter	Defect	Comments	Critical	Repair incomplete
A1	Rm 107	8 inch from 22 inch	OX	OX removed. Pit size of order of 1/32 inch is present. This needs to be repaired.	yes	yes
a6	Rm 107	8 inch from 22 inch	IP	Originally a 1/4 length of lack of incomplete penetration. The grinding revealed clear lack of fusion. There is no weld here. This is through wall. Repair not completed	yes	yes
4	Rm 107	22 inch	IP	inside first seam, repair not complete.	yes	yes
8	Rm 107	22 inch	CC	Originally a deep crater crack. Grinding has revealed pit. Presently less than 1/32 inch in size. This could be through wall. Needs to be chased. Repair not completed	yes	yes
9	Rm 113	14 inch from 22 inch	CC	Location 6 feet from west wall. CC on seam. The CC has been ground and the resulting indication is that the remaining in this section is not a pinhole. The repair is not completed.	yes	yes
12	Rm 113	10 inch from 18 inch	CC	Location BSC drop west. CC is internal. The CC has been ground. The repair is not completed.	yes	yes
13	Rm 113	10 inch from 18 inch	Porosity	This has not been completed. There is a pit on each side. This likely to be through wall	yes	yes
21	Rm 117	18 inch	OL	This was inspected twice on Aug 3. The removed overlap reveals a defect. Neither results were acceptable. This requires rework.	yes	yes
23	Rm 117	18 inch	OL	Located opposite of Ref/rework 21. This repair has not been completed.	yes	yes
34	Rm 117	10 inch from 22 inch	OL	Location BSC internal. On Aug 3 this was reject and repaired to satisfaction. This has been ground to sound metal.		complete
38	Rm 118	10 inch from 22 inch	CC	Internal CC, this has been marked from inspection prior to May inspection. The repair is not complete.	yes	yes
44	Rm 118	18 inch	OL	Severe OL. This is was present. The repair was redone and is acceptable. And complete.		complete
59	Rm 112	12 inch	CC	Located over shower. The bottom of the crater crack still remains.	yes	yes
64	Rm 111	8 inch	IP	3/8 length of IP. The repair is not complete.	yes	yes
68	Rm 110	8 inch	IP	Length of IP on seam. The repair is not complete	yes	yes
71	Rm 109	8 inch	CC	Located after elbow @ 3 o'clock. Repair is required.	yes	yes
73	Rm 109	8 inch	CC	Located interior seam @ drop. Bottoms of crater crack still present. Repair is needed.		
75	Rm 109	8 inch	CC	Located @ drop after T.D.		complete

TABLE 2
August 4 and 5, remainder of inspection of BSL.

This is the tabulation for the inspection of the roof ducting and the remainder of the accessible welds on the lower ducting system that was conducted on August 4 and 5, 2004. In the interests of brevity the germane photographs will be sent under separate cover.

August 3. INSPECTION REFERENCE NUMBER	LOCATION OF WELDMENT	DIA. OF DUCT	TYPE OF DEFECT	COMMENTS/ PHOTOGRAPH I.D.	CRITICAL	REQUIRES FURTHER INSPECTION
1	Roof, elbow south riser @ sound attn	22"	Lack of Fusion		Critical	
2	Roof, elbow south riser @ sound attn	22"	Lack of Fusion		Critical	
3	Roof, elbow south riser @ sound attn	22"	Lack of Fusion		Critical	Grind to inspect
4	Roof, south riser @ 3 o'clock.	22"	Lack of Fusion			Grind to inspect
5	Roof, south riser @6 o'clock. T intersection	22"	Crater Crack			
6	Roof, south riser	22"	Crater Crack			
7	Roof, south riser 5th joint down	22"	Crater Crack			
8	Roof, @Y take off. First joint.	22"	Crater Crack	This has been ground, it is a CC. It is not porosity.	Critical	
9	Roof, bottom of Y, first joint. 2 places.	22"	Crater Crack	2 places of CC	Critical	Grind to inspect
10	Roof, Horizontal @ HEPA bank	22"	Crater Crack	This has been ground, it is a CC. It is not porosity.	Critical	
11	Roof, elbow & 2nd HEPA, rear	22"	Crater Crack	This has been ground, it is a CC. It is not porosity. 9 areas.		9 areas to be ground
12	Roof, horizontal @ HEPA bank 2nd bottom.	22"	Lack of Fusion			Grind to inspect
13	Roof, horizontal @ HEPA bank 2nd bottom.	22"	Crater Crack			
14	Roof, elbow @ 2nd HEPA, front. 2 places.	22"	Lack of Fusion	2 places of LF	Critical	
15	Roof, horizontal, 2 o'clock.	22"	Crater Crack			

16	Roof,	22"	Porosity			Grind to inspect
17	Roof, horizontal run @ 90 elbow	22"	Crater Crack			
18	Roof, elbow to vertical run @ 6 o'clock	22"	Porosity			
19	Roof, before elbow to vertical run @ 6 o'clock	22"	Crater Crack			
20	Roof, vicinity of #17 @ 7:30	22"	Crater Crack	This has been ground, it is a CC. It is not porosity.	Critical	
21	Roof, inboard run @ 2:30 elbow	22"	Crater Crack			
22	Roof, inboard run @ 2 o'clock	22"	Crater Crack			
23	Roof, inboard run @ 3 o'clock	22"	Crater Crack			
24	Roof, inboard run @ 7 o'clock	22"	Crater Crack			
25	Roof, inboard run @ 6 o'clock	22"	Excessive excavation.	Requires fill		
26	Roof, inboard run @ 6 o'clock	22"	Lack of Fusion		Critical	Grind to inspect
27	Roof, inboard run @ 6 o'clock	22"	Lack of Fusion		Critical	Grind to inspect
28	Roof, inboard run @ 6 o'clock	22"	Lack of Fusion		Critical	Grind to inspect
29	Roof, elbow of vertical run @ 3 o'clock	22"	Crater Crack			
30	Roof, upper level. Base metal weld repair. 1" away from weld. Inboard section @ elbow.	22"	Weld repair		Critical	
31	Roof, upper level. Elbow up vertical run, outboard.	22"	Crater Crack			
32	Roof, upper level. West unit. Extending off roof @ 7 o'clock.	22"	Crater Crack			
33	Mechanical room, west. Next to hatch	22"	Crater Crack			
34	Mechanical room, west. Elbow close to roof	22"	Crater Crack			

35	Mechanical room, west. Elbow.	22"	Crater Crack			
36	Mechanical room, west. Opposite of # 34.	22"	Crater Crack			
37	Mechanical room, west. Vicinity of #34.	22"	Crater Crack			
38	Mechanical room, west. Vicinity of #34.	22"	Crater Crack	This has been ground, it is a CC. It is not porosity.		
39	Mechanical room, west.	22"	Crater Crack			
40	Mechanical room, west.	22"	Crater Crack			
41	Mechanical room, west.	22"	Crater Crack			
42	Mechanical room, south wall. Prior to elbow.	22"	Lack of Fusion			
43	Mechanical room, south wall 90 degrees from #42	22"	Crater Crack			
44	Mechanical room, south wall, vicinity of # 42.	22"	Crater Crack			
45	Mechanical room, south wall, horizontal run east of #44.	22"	Crater Crack			
46	Mechanical room, east side, vertical run.	22"	Crater Crack			
47	Mechanical room, east side, vertical run.	22"	Lack of Fusion		Critical	
48	Mechanical room, east side, vertical run.	22"	Crater Crack			
49	Mechanical room, east side, @ elbow, above # 47.	22"	Crater Crack			
50	Outside of room 118, south. New construction area	22"	Crater Crack	3 places of CC.		
51	Outside of room 118, south. New construction area.	22"	Crater Crack			
52	Outside of room 118, south. New construction area	22"	Crater Crack		Critical	

53	Outside of room 118, south. New construction area.	22"	Crater Crack			Grind to inspect
54	Outside of room 118, south. New construction area.	22"	Crater Crack			Grind to inspect
55	Outside of room 118, south. New construction area.	22"	Crater Crack			
56	Outside of room 118, south. New construction area.	22"	Crater Crack			Grind to inspect
57	Outside of room 118, south. New construction area.	22"	Crater Crack			
58	Outside of room 118, south. Outside of new construction area.	22"	Crater Crack	Crater crack id deep, maybe through wall.	Critical	
59	Outside of room 118, south. New construction area.	22"	Crater Crack			
60	Outside of room 118, south. New construction area.	22"	Crater Crack			Grind to inspect
61	Outside of room 118, south. New construction area.	22"	Crater Crack	2 places of CC		
62	Outside of room 118, south. New construction area. Close to flange	22"	Lack of Fusion		Critical	
63	Outside of room 118, south. New construction area.	22"	Porosity	Maybe through wall	Critical	Grind to inspect
64	Outside of room 118, south. New construction area.	22"	Pit			
65	Outside of room 118, south. New construction area.	22"	Lack of Fusion		Critical	
66	Outside of room 118, south. New construction area.	22"	Crater Crack			

D

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Attorneys for Defendants State of Idaho, Ken Gardner, David Rooke,
Jan Frew, Larry Osgood, Chris Motley, and Elaine Hill

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho)	
corporation,	)	Case No. CV OC 0508037
)	
Plaintiff,	)	[Consolidated with Case No. CV OC 06-
v.	)	00191]
)	
SE/Z CONSTRUCTION, LLC, an Idaho limited)	
liability company; and STATE OF IDAHO,	)	AFFIDAVIT OF ALBERT F. MUNIO
acting by and through its Department of	)	IN SUPPORT OF DEFENDANT
Administration, Division of Public Works,	)	STATE OF IDAHO'S OPPOSITION
	)	TO HOBSON FABRICATING
Defendants,	)	CORP.'S AND SE/Z CONSTRUCTION,
	)	LLC'S MOTIONS FOR PARTIAL
	)	SUMMARY JUDGMENT

AFFIDAVIT OF ALBERT F. MUNIO IN SUPPORT OF DEFENDANT STATE OF IDAHO'S OPPOSITION TO
HOBSON FABRICATING CORP.'S AND SE/Z CONSTRUCTION, LLC'S MOTIONS FOR PARTIAL
SUMMARY JUDGMENT - 1

COPY

NO. _____ FILED _____
A.M. _____ P.M. _____

MAY 22 2006

J. DAVID NAVARRO, Clerk
By M. SHAPPEL
DEPUTY

COPY

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant,

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter-Cross-Defendant.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works

Third-Party Plaintiff,)
v.)
))
RUDEEN & ASSOCIATES, A)
PROFESSIONAL COMPANY, an Idaho)
limited liability company,)
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Third-Party Defendant.)
))
HOBSON FABRICATING CORP., an Idaho)
corporation,)
))
Plaintiff,)
v.)
))
KEN GARDNER, an individual; DAVID)
ROOK, an individual; JAN FREW, an)
individual; LARRY OSGOOD, an individual;)
CHRIS MOTLEY, an individual; and ELAINE)
HILL, an individual,)
))
Defendants,)
))

Case No. CV OC 06-00191

STATE OF IDAHO)
) ss.
County of Ada)

ALBERT F. MUNIO, being first duly sworn upon oath, deposes and states as follows:

1. I am a mechanical engineer employed by Washington Group International ("Washington Group"). Attached hereto as Exhibit "A" is a true and correct copy of my *curriculum vitae*.

2. In July of 2005, Washington Group was retained by the State of Idaho, Department of Administration, Division of Public Works ("DPW") to engage in a Design Review ("the Review") of "DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3" ("the Project"). Technical personnel from Washington Group performing the Review included Ron Toy, Tom Moffett, Paul Fu, Dick Robertson, Basil Tupy and myself ("the Review

Team”). I served as the Project Engineer for the Review of the Project. As such, I coordinated the Review and was present at the majority of the inspections of the Project location (“the BSL-3 Site”) carried out by the Review Team. With respect to the inspections at which I was not personally present, I monitored the Review Team’s documentation of those inspections, including the results and conclusions of those inspections. The Review consisted of an assessment of the viability of the Project’s design, as well as physical inspections of the BSL-3 Site to identify work still needing completion and deficiencies in the completed work. Attached hereto as Exhibit “B” is a true and correct copy the Project Status Report issued by Washington Group on December 21, 2005 as a result of the Review.

3. When I first viewed the BSL-3 Site, the Project appeared to be 90-95% complete. I believed from my initial observations of the BSL-3 Site that the Project only required a small amount of work and HVAC system balancing to reach completion.

4. Further inspection by the Review Team of the work completed on the Project by the mechanical sub-contractor, Hobson Fabricating Corp. (“Hobson”), revealed that such work was not only not in accordance with the Project’s design specifications, but that the work was deficient and unacceptable by normal industry standards.

5. The Review Team’s inspections first revealed that there was an inordinate amount of air leakage into the ceiling space, caused primarily by leakage from the medium pressure supply ductwork and/or its components. This warranted more in-depth inspections, which led to the discovery of numerous latent defects in Hobson’s mechanical work on the Project. What at first appeared to be a small air leakage problem mushroomed into the discovery of several critical issues with the exhaust systems.

6. During the Review Team’s inspections of accessible portions of the stainless steel

ductwork of the exhaust system, the Review Team noted several irregularities in the weld quality and flange closure bolting. Accordingly, we retained a mechanical contractor, to perform an in-depth inspection of the duct system. The mechanical contractor performed both an external inspection and an internal inspection, utilizing a camera placed inside the ductwork. The mechanical contractor's inspection of the ductwork revealed that Hobson had apparently failed to maintain an inert gas purge during welding operations, which is normally employed for welding stainless steel and was required in the Project specifications. An inert gas purge is typically performed using argon gas to protect seal the stainless steel from oxidation during weld operations. The mechanical contractor discovered serious "sugaring" in the ductwork, a type of oxidation that frequently forms when the inert environment is not maintained during welding of stainless steel. The mechanical contractor additionally discovered unbelievable amounts of dirt and debris in the allegedly completed ductwork. In short, the mechanical contractor's inspections uncovered unacceptable weld conditions and internal contamination that did not meet normal industry standards, let alone the Project specifications.

7. In addition, although the Project specifications allowed for a very limited number of flange joints in the stainless steel exhaust ductwork, Hobson had installed a much higher quantity. Most of these additional flange joints were inadequately bolted and were located in inaccessible areas that would have presented problems if the joints had leaked and required maintenance.

8. As the inspections progressed, the Review Team also discovered that 13 of the 14 primary HEPA filters in the Biological Safety Cabinets (BSC's) installed by Hobson were damaged beyond use and completely unsuitable for the purposes for which the BSL-3 laboratory was intended. Many of the filters and filter housings were dirty, having been contaminated

during installation. The damage to the filters was likely caused during installation. However, even if the filters were damaged prior to installation, the serious damage should have been very apparent to Hobson. Further, the secondary filters and filter housings located on the roof were dirty and also unsuitable for use, having been contaminated. The damage to the secondary filters also appeared to have been caused during installation.

9. When the Review Team removed the HEPA filters in the BSC's to access the exhaust duct for inspection, we also discovered that Hobson had apparently installed the isolation dampers for the Primary Procedures Laboratory BSC's later in the construction process than intended in the specifications. The seals on the those dampers as well as the dampers installed on the bypass type BSC's were seriously torn, probably due to careless or erroneous installation. As with the HEPA filters, the serious damage to the seals of the isolation dampers should have been very apparent to Hobson and corrected. In addition, the bypass BSC's in the balance of the BSL facility are not provided with isolation dampers, though they were specified and were specifically emphasized as a requirement during the submittal review process. The absence of these isolation dampers negates the ability to periodically decontaminate these BSC's, which is an operational procedure requirement for BSL rated facilities.

10. If the BSL-3 laboratory had been put into use with the aforementioned deficiencies in Hobson's mechanical work and if a critical test had been performed, there would have been a great potential for a release to the atmosphere of extremely dangerous substances, jeopardizing public safety. The BSL-3 facility was specifically designed to process samples of substances potentially jeopardizing public health and safety such as anthrax or avian flu virus. The exhaust systems are critical components for the safe filtration and capture of dangerous substances, ensuring that they are not released into the environment outside of the BSL facility.

As constructed by Hobson, the exhaust system would not have functioned as needed to ensure the safety of Boise's citizens.

11. In addition to the above, the Review Team discovered that Hobson did not adequately complete the seismic supporting of the BSC's, although it had been clearly called for in the specifications. Specified seismic supporting was apparently ignored by Hobson, as no evidence of analysis by a structural engineer or formal submittal of system bracing calculations or support design recommendations was found in the project documentation. Although the manufacturer of the hoods, Baker Co., offers several types of seismic restraints that have to be assessed and coordinated with the building structure, none of that work appears to have been performed by Hobson. On one 4-foot BSC, Hobson had placed clip angles on the feet of the cabinet; however, the clip angles would not meet the seismic criteria applicable to this project. On a related seismic issue, the project specifications also required engineered analyses and designs of hangers and supports for the piping and duct systems to meet project seismic criteria. As with the seismic supports for the BSC's, no evidence of attempted compliance was found in the project documentation for the piping and ductwork.

12. As averred in our Project Status Report, in order for the BSL-3 laboratory to operate safely and in compliance with the Project specifications at this time, a great deal of the mechanical work completed by Hobson must be removed and replaced.

13. Based upon my education, training, and experience as a mechanical engineer and upon my participation in and/or review of the inspections performed by the Review Team and by the mechanical contractor, in conjunction with the Review, it is my professional opinion that the mechanical work completed on the Project by Hobson was a gross deviation from the Project specifications, was defective, was not completed in accordance with good construction practices,

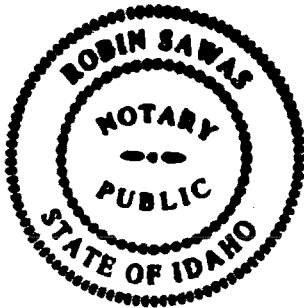
and did not meet normal standards within the industry.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Albert F. Munio

ALBERT F. MUNIO

SUBSCRIBED AND SWORN TO before me this 22 day of May, 2006.



Robin Sawas

Notary Public for Idaho

Residing at Boise, Idaho

Commission expires: May 1, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May, 2006, I caused to be served a true copy of the foregoing AFFIDAVIT OF ALBERT F. MUNIO IN SUPPORT OF DEFENDANT STATE OF IDAHO'S OPPOSITION TO HOBSON FABRICATING CORP.'S AND SE/Z CONSTRUCTION, LLC'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

John Spencer Stewart
Thomas A. Larkin
Stewart Sokol & Gray, LLC
2300 SW First Avenue, Suite 200
Portland, OR 97201-5097
Fax No. (503) 223-5028

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Frederick J. Hahn, III
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P. O. Box 50130
Idaho Falls, ID 83405
Fax No. (208) 523-9518

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Robert A. Anderson
Anderson, Julian & Hull, LLP
250 S. 5th Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426
Fax No. 344-5510

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

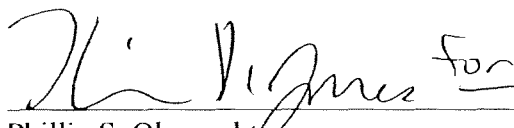

Phillip S. Oberrecht

EXHIBIT A

Mr. Munio's *Curriculum Vitae*

NAME: ALBERT F. MUNIO

EDUCATION: B.S., Mechanical Engineering
Western Pennsylvania Technical College, 1960
Additional Courses - University of Colorado, Denver University,
Boise State University

ADDITIONAL TRAINING: Continuing Education Courses - Fails Institute, Battelle Institute, ASHRAE, NFPA, Geothermal Resources Council, Morrison Knudsen, Dale Carnegie, ASME, and others.

ASSOCIATIONS: American Society of Heating, Refrigeration and
Air Conditioning Engineers (ASHRAE)
National Fire Protection Association (NFPA)
American Water Works Association

YEARS OF EXPERIENCE: 50

CAREER SUMMARY:

Extensive experience in commercial and industrial engineering with emphasis on mechanical design, including piping, plumbing, HVAC, fire protection, and mechanical systems design and construction supervision. Background includes project management and supervision, detailed design, estimating, and procurement. Areas of specific experience include direct usage and industrial geothermal, cogeneration, hydroelectric, energy conservation, industrial boilers, materials handling, air correction, compressed gas systems, industrial cooling, hydronic systems, process piping, HVAC systems, fire protection and detection, and construction support.

WORK EXPERIENCE:

WASHINGTON GROUP INTERNATIONAL (Formerly Morrison Knudsen Corp.), Boise, Idaho

1990 - Present

PRINCIPAL ENGINEER – MECHANICAL - Currently assigned to the Integrated Projects Group. Supervise design engineering associated with environmental and industrial projects. Responsible for performing and directing the design of mechanical, HVAC and Piping for industrial and hazardous waste handling facilities. Recent projects include:

- **State of Idaho BSL-3 Laboratory – Boise, Idaho.** Project Engineer for design review, status assessment, and development of recommendations for upgrade and completion of project to meet NIH and specification requirements. Coordinated efforts of diverse team of engineers, subcontractors, and technical specialists to determine project status, identify deficiencies, and develop recommendations to bring project to satisfactory completion in accordance with specification and code requirements. Provided primary interface and status reporting to DPW project manager.
-

- **Darualaman Military Base – Kabul, Afghanistan.** Lead Engineer for USA based support of procurement and construction activities. Interfaced with design subcontractor and major suppliers to implement the manufacture, shipment, and installation of major equipment and systems including sewage treatment plant, potable water pumping, storage, and distribution system, power generation and distribution system, fuel oil storage and distribution system, and HVAC systems for all buildings. Provided engineering support to construction team throughout construction process.
- **Advanced Mixed Waste Treatment Project, INEEL – Idaho Falls, Idaho.** Modified and upgraded procurement specifications for custom air handling equipment to match project requirements. Reviewed procurement proposals for conformance with design requirements and intent of specifications. Developed bid evaluations and purchase recommendations for major mechanical equipment and systems. Conformed specifications to match procured equipment and systems. Responsible engineer for submittals review and approval for major mechanical equipment, fire protection and detection systems, and drummed waste handling facility. Performed peer review and code interpretation input to procurement specification for HEPA filters and housings. Inspected and witnessed validation tests at factory for custom air handling equipment and fans. Lead mechanical engineer during construction for installation and start-up of mechanical equipment and systems. Upgraded design of fire protection and detection systems, hydronic heating and cooling system, plumbing system, and plant utilities systems to satisfy code requirements and optimize operability.
- **Waste-Tec Services - Kimball, Nebraska.** Lead Mechanical/Piping Engineer, for design of 12,000 pph hazardous waste incinerator and associated support and service facilities. Scope included waste processing, support and administrative facilities, liquid fuel storage and distribution, and site utilities.
- **Ontario Hydro - Sarnia, Ontario, Canada.** Project Engineer, for design of flue gas desulfurization systems and support facilities at two 500 MW coal fired power plants. Scope included limestone preparation, gypsum reclaim and storage, and high quality waste water treatment prior to discharge to the St. Clair River.
- **Zunil I Power Plant - Quezaltenango, Guatemala.** Project Engineer responsible for design of power block, two-phase brine gathering, and spent brine injection systems for 30 MW single-flash steam cycle geothermal power plant.
- **Illinois Low Level Radioactive Waste Facility - Martinsville, Illinois.** Lead Mechanical/Piping Engineer, for preliminary design phase of low-level waste repository in southeastern Illinois. Scope included building services, HVAC systems, HEPA filter systems, radionuclide contaminated wastewater systems, and utilities and fire protection systems.

- **Texas Low Level Radioactive Waste Facility - El Paso, Texas.** Lead Mechanical Engineer, for design of mechanical aspects of campus style support facilities for this low-level radioactive waste repository. Scope of services included HVAC design employing direct/indirect evaporative cooling, contaminated air correction, and design of potable and fire-water storage and distribution.
- **St. Charles County Well Field Design - near St. Louis, Missouri.** Lead Mechanical Engineer, for design of new well field to replace existing contaminated well field. Scope of services included interface with St. Charles County management, Missouri Department of Natural Resources authorities, and Department of Energy project management to secure approval. Well field capacity was 24 million gallons per day.
- **Weldon Spring Site Remedial Action Project (WSSRAP) CSS Pilot Scale Test Facility - near St. Louis, Missouri.** Project Engineer for design and construction oversight of pilot test facility to determine pumping capabilities and stabilization requirements for radionuclide contaminated thixotropic sludge, methods for control of radon emissions during handling and stabilization, and developed design criteria for full scale remediation facility. Project scope included development of process flow diagrams, P&ID's, and complete construction drawings and specifications. Equipment selections and specifications included gravity thickener, pug mill, high-shear mixer, progressing cavity and centrifugal pumps, radon and plant air compressors, and related atmospheric and pressurized storage vessels. Scope also included design and specification of pumped dredge equipment for sludge reclaim.
- **Weldon Spring Site Remedial Action Project (WSSRAP) CSS Production Facility.** Lead Mechanical/Piping Engineer, for design of 80 ton per hour CSS facility to process raffinate sludge and other hazardous waste streams residual from suspended, defense related operations. Scope of work included development of site arrangement drawings, selection, specification, and approval review of process equipment, design and specification of prefabricated modules to optimize construction, and design of piping systems and materials transport systems.
- **Office of Civilian Radioactive Waste Management (OCRWM), Las Vegas, Nevada - ESF Facilities Design Mechanical Engineer** for various design projects, including Thermal Test Facility Design, Drift Ventilation System and Utilities Design. Also provided engineering support for ventilation systems design for the emplacement facility. Responsible for the sizing, selection, and layout of the HEPA filters, carbon absorbers, and ventilation systems fans and appurtenances related to the HEPA systems.
- **Idaho National Engineering and Environmental Laboratory (INEEL), Arco, Idaho - Advanced Mixed Waste Treatment Facility**

and WMF-634 Waste Characterization Facility Mechanical Engineer for various tasks related to development of construction design for both facilities. Specific tasks included sizing and procurement specification development for process area ventilation system equipment and components, including extract fans, primary HVAC equipment, air tempering and supply equipment, ductwork systems and accessories, energy recovery equipment, and air distribution equipment. Also responsible for procurement specification development for administrative support area HVAC systems, equipment, and controls.

POWER ENGINEERS, INC., Hailey, Idaho

1985 – 1989

PRINCIPAL ENGINEER - MECHANICAL - Served on the following projects:

- **Hydroelectric Facilities Modernization and Upgrade - Washington Water Power Co. - Spokane, Washington. Lead Mechanical Engineer** for various hydroelectric upgrade projects in the WWP generation system, including Kettle Falls, Nine Mile, Long Lake, Little Falls, Cabinet Gorge, and Noxon Rapids. Scope of services included sizing, selection, and specification of equipment to retrofit from mechanical to electro-mechanical governor systems, generator cooling systems improvements, centralized lubrication systems, plant ventilation upgrades, turbine draft chest purging system upgrades, and resizing and specifying new plant and instrument air systems. Scope also included construction oversight and startup supervision.
- **Processing Building Addition - Kerr McGee Corp- Soda Springs, Idaho. Project Manager** for design and construction oversight of new process building at this minerals processing facility. Scope of work included design and procurement specification development for new building, including electrical, utilities systems, and process piping systems design.
- **Hydroelectric Modernization and Improvement Project - Boise Cascade Corp. - International Falls, Minnesota. Project Engineer** for turbine modernization and upgrade project at this pulp and paper production facility. Scope of work included upgrade of equipment, development of control philosophy, and development of interface concepts for integration into control system of remote thermal cogeneration control room.
- **Hydroelectric Modernization and Improvement Project - Moses Lake, Washington. Mechanical Engineer** for turbine modifications and ancillary systems upgrades at this generation facility located on the Columbia River in South Central Washington.
- **Hydroelectric - Sithe Energy Corp. - Burley Idaho. Mechanical Engineer** for construction oversight and SCADA system controls

integration project at this low head generation project on an irrigation canal in South-Central Idaho. Scope of work included construction oversight, and development of control philosophy and interface concepts for remote operation of facility.

- **Refinite Building Design - The Amalgamated Sugar Company, Twin Falls, Idaho. Project Manager** for design of new process building at this major sugar processing facility. Scope of work included development of drawings and specifications for new precast concrete structure to house process equipment and systems for expanded processing of residual molasses.
- **New Water Distribution System - St. Anthony Youth Training Center - St. Anthony, Idaho. Project Manager** responsible for the design of new water distribution system to serve both potable and fire protection needs of the entire campus of this youth correctional facility. Design included upgrade of system chlorinating facilities, improvements to piping at elevated storage tank, monitoring and control of well pumps, and integration of new firewater pumps to serve buildings' sprinkler systems and area fire hydrants. Construction oversight, progress billing verification, and acceptance testing were also part of scope of services.
- **New Sanitary Sewage Collection system - St. Anthony Youth Training Center - St. Anthony, Idaho. Project Manager** responsible for design of new sanitary sewage collection system for this multi-building youth correctional campus. Scope included layout and sizing of mains, siting of service manholes, and connection to city main, which required design of a canal crossing. Services also included construction oversight, progress billing verification, and system acceptance testing.
- **Cogeneration Feasibility Study, Idaho Fresh-Pak - Lewisville, Idaho. Project Manager** for study for combustion turbine based cogeneration facility in eastern Idaho. Plant was sized to generate power for normal plant operations. Heat recovery boiler produced 150 PSIG steam to supplement existing steam boilers.
- **Steam Separator Replacement and Redesign - Geysers, California. Project Manager** for replacement of existing separator at GEO Operator Corporation's Unit 15 gathering system in the Geysers Geothermal Area. Project involved specification of the new separator and piping system design changes to extend power plant life expectancy, including a steam wash system to remove particulate impurities. Existing piping and component systems redesign included stress analysis, new tank and foundation design, and new pump, piping, and valves specification.
- **Steamboat Springs Gathering System - Caithness Energy, Reno, Nevada. Project Engineer** for design of a brine gathering system from production wells to the steam separator located at the power plant site. The cross-country, two-phase system transported brine from multiple

geothermal wells to supply a single stage flash steam power plant. The pipeline employed 10-inch through 36-inch piping. Scope of work also included design of system warm up and emergency dump piping, as well as design and specification of a silencer for emergency atmospheric steam release.

- **Ormesa Geothermal Project - California. Project Manager** responsible for acceptance test criteria development and witnessing the testing of a 23-MW binary cycle geothermal power plant in Southern California. Prepared test procedures and performance specifications, witnessed tests for plant components, interpreted performance test results for acceptability, and prepared formal report for issuance to the Department of Energy and the project's long-term lenders.
- **Oxbow Geothermal Pilot Plant Scaling Test - Nevada. Project Engineer** for design, fabrication, and start-up of an injection system scaling pilot test for Oxbow Geothermal. Project required complete design, specification, purchase and supply of a test system module to simulate operating conditions, including a two-phase flow separator, test beds, control and sampling systems. Analytical equipment, and sampling and analysis procedures were also specified.
- **Geo 1 Geothermal Project - California. Project Engineer** responsible for design and specifications development for geothermal brine gathering and injection systems for a 70-MW double flash geothermal facility. The project was the first double-flash plant to employ brine pumping for fluid delivery to the plant site.
- **BLM-1, Navy 2 and Navy 3 - California. Project Engineer** for design and specification of two-phase cross-country geothermal brine gathering system for one 25-MW plant and two 30-MW generating units. Also performed liaison engineering duties; coordinated work efforts with efforts of plant design engineer.
- **Cove Fort - Utah, Project Manager** responsible for the design cooling tower system to remedy condensate flash and condenser back-pressure problems on 10-MW binary cycle power plant. Witnessed annual performance testing of plant on behalf of owner and long-term lender.
- **Salmon River Electric Cooperative - Custer County - Idaho, Project Manager** responsible for performing energy audits and evaluations of existing systems for the Elementary, Middle, and High School facilities, and for the County Courthouse and Office facilities. Analysis included evaluation and modeling of new central plant and geothermal heat pump systems, for comparison to existing central station with unitary cooling units system.

MORRISON-KNUDSEN COMPANY, INC. - POWER GROUP, Boise, Idaho

1981 - 1985

SENIOR STAFF ENGINEER - Project experience included:

- **University of Alaska, Fairbanks - Boiler Plant Expansion. Lead Mechanical Engineer** responsible for the mechanical portion of the design for central boiler plant expansions and modifications. Project scope included new 100,000 PPH oil fired steam boiler, new baghouses on two existing 50,000 PPH coal fired boilers, condenser surface for existing cogeneration turbine, and miscellaneous modifications to piping systems. Project also included energy analysis of entire UAF campus to determine expansion requirements.
- **SMUD/McClellan 700-MW Gas Turbine Power Plant - California. Staff Engineer** involved with design of primary fuel processing, fuel forwarding and pressure boosting systems at combustion turbine peaking generation facility at military base. Designed natural gas compressor station and distribution piping, backup fuel oil processing, forwarding and storage system, and turbine air intake filtration/cooling systems. Also designed HVAC and potable/fire water systems.
- **Cerrejon Combustion Turbine Generator Sets - Barranquilla, Colombia, South America. Lead Mechanical Engineer** for the temporary and standby power supply systems for Exxon's Cerrejon Coal Project in Colombia, South America. Responsible for sizing and specifying two combustion turbine generator sets at the mine and one located at the seaport serving the mine. Project scope included special air filtration systems and evaporative cooling of inlet air to improve generating efficiency.
- **Thule Air Force Base 20-MW Power Plant- Greenland. Staff Engineer** for design of 20-MW internal combustion engine based cogeneration facility for Thule Air Force Base, Greenland. Facility provides power for early warning radar systems. Heat recovery boilers provided steam for comfort heating on the air base. Design involved arctic design concepts to address harsh climate hardships, seasonal inaccessibility, and severely fluctuating power demand.
- **Kettle Falls 46-MW Wood-Fired Generating Plant - Washington. Staff Engineer** responsible for design, specification, and construction oversight of process piping, HVAC, fire protection, plumbing, fuel delivery and reclaim, plant insulation, ash removal, and boiler flue gas correction for 46-MW hogged wood-fueled power generation facility. HVAC design integrated plant ventilation into the combustion air system to optimize boiler efficiency. Designed site utilities, including natural gas distribution, sanitary sewer, and combined potable/fire water grid system to serve complex.

ENGINEERED PRODUCTS, INC., Boise, Idaho

1972 - 1981

GENERAL MANAGER - Responsible for equipment specification, system

ALBERT F. MUNIO, continued

design, procurement, and start-up of mechanical systems for commercial and industrial facilities. Major projects included HVAC systems for multi-story office buildings, retail shopping complexes, and electronics manufacturing facilities.

MECHANICAL EQUIPMENT AND ENGINEERING, INC., Boise, Idaho

1969 - 1972 **SALES ENGINEER** - Responsible for equipment sizing and specification for industrial and commercial projects.

AUBENDERSON, INC., Denver, Colorado

1966 - 1969 **CHIEF ENGINEER** - Responsible for engineering design, materials procurement, cost estimating, materials control, quality control, and fabrication shop management.

WISDOM, SUDWEEKS AND WHITE, Boise, Idaho

1962 - 1966 **DESIGN ENGINEER** - Responsible for design of HVAC, plumbing, and piping systems for major commercial and industrial facilities throughout Idaho and Eastern Oregon.

GRAFE-WEEKS CORPORATION, Pittsburgh, Pennsylvania/Boise, Idaho

1960 - 1962 **PROJECT ENGINEER** for Titan One Missile Facility near Mountain Home, Idaho.

BLAW KNOX COMPANY, Pittsburgh, Pennsylvania

1956 - 1960 **PROJECT ENGINEER** for Atlas Missile Facilities near Topeka, Kansas and Spokane, Washington.

(1200)

EXHIBIT B

Washington Group International Report



Washington Group International

Integrated Engineering, Construction, and Management Solutions

December 21, 2005

Elaine Hill, School Safety/Project Manager
STATE OF IDAHO
Division of Public Works
502 N. 4th Street
P.O. Box 83720
Boise, Idaho 83720-0072

**SUBJECT: PROJECT STATUS REPORT – DPW PROJECT #06350
DESIGN REVIEW OF DPW PROJECT #02-353
H&W REMODEL STATE LAB FOR BSL-3**

Dear Elaine:

Washington Group International, Inc. (Washington Group) is pleased to submit this Project Status Report as the final deliverable for the Phase 1 services for your Project # 06350.

As this report indicates, the initial design met NIH requirements and should have been operable as presented; however, the facility as constructed contains numerous deficiencies that neither meet specified criteria nor Code requirements. There were also numerous deficiencies identified during our physical inspection of the facility. The report details the major deficiencies identified and the remedy recommended. Appendix A to the report provides over 160 photographs detailing the deficiencies noted during the facility inspection.

Appendix B includes a preliminary arrangement proposed for Shower Rooms 111 and 112 that would provide the clearances required for ADA compliance. Also included in Appendix B is a Washington Group letter to the City of Boise Public Works Department to document our understanding of the accord reached regarding BSL-3 Laboratory waste water decontamination and disposal.

Appendix C provides supporting documentation on their pricing from Washington Group's selected subcontractors as listed in the Price Schedule contained in the report. Note that the subtask-pricing breakdown from YMC, Inc. is provided for informational purposes only. YMC, Inc. is committed that their total invoice amount for the remedial services defined will not exceed the GMP value shown. However, the final invoice amounts for the incremental items may vary from the values shown.

As an element of the on-site physical inspection services, YMC, Inc. performed a camera inspection of the interior of the stainless steel exhaust ductwork. Extensive deficiencies

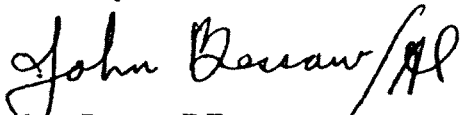
Washington Group International

and contamination problems were identified that will necessitate correction as described in the report and in YMC's proposal. A DVD reproduction of those inspection results will be hand delivered to DPW separately from the report.

Lastly, the report provides a summation of the estimated costs to remedy the deficiencies and elevate the quality of this BSL-3 Laboratory to the level mandated for operation within the NIH standards applicable. Washington Group and YMC are both optimistic that the prices shown will prove to be conservative. However, while the extensive evaluations and inspections completed have divulged most of the expected deficiencies, there remain several unknowns, the final remedies for which will not be determined until construction.

Thank you for this opportunity to perform professional services on behalf of DPW. We look forward to providing you with the Phase 2 remedial services associated with this project, and are confident that the end product will fully satisfy your expectations and needs.

Sincerely,

A handwritten signature in black ink, appearing to read "John Bessaw" followed by a stylized flourish or initials.

John Bessaw, P.E.
Project Manager

cc: Al Munio

PROJECT STATUS REPORT

For

**State of Idaho
Department of Administration
Division of Public Works
DPW Project # 06350**

**“Design Review of DPW Project #02-353
H&W Remodel State Lab BSL-3”**

December 2005

Submitted by



**Washington Group
International**

INTRODUCTION

Washington Group International, Inc. (Washington Group) was contracted by the Idaho State Department of Public Works (DPW) to assess the viability of the design for its BSL-3 Laboratory located within the Idaho State Health Laboratories building in Boise, Idaho, and to assist DPW in bringing the laboratory to construction completion and satisfactory operation and commissioning. The facility had been initially contracted for construction in July 2003, with completion scheduled for May 2004. After two years of seemingly endless confrontation and problems, with completion more than thirteen months delinquent and still indeterminate, the construction and A/E contracts were terminated for convenience by DPW.

Washington Group's approach to accomplishing its assigned objectives on this project is two-phased. Under Phase 1, Washington Group performed a complete review of the construction documentation to determine its conformance with applicable codes and standards normal to the design and operation of BSL-3 laboratory facilities. This effort was jointly performed by the Boise, Idaho and Princeton, New Jersey offices of Washington Group, with Boise providing mechanical design review as well as most of the local coordination and interface services, and Princeton providing design review for architectural, electrical, and HVAC control system disciplines. The Princeton office of Washington Group includes a Pharmaceuticals Group specifically dedicated to support of the pharmaceuticals industry, with a multi-disciplined group of design professionals who possess unique qualifications in laboratory and production facilities design, construction, and commissioning services.

After completion of the design review, the reviewers were designated to perform a physical inspection of the as-constructed facilities to identify items yet needing completion and/or to identify deficiencies needing correction. In concert with the physical inspection, Washington Group solicited assistance from YMC, Inc. to perform in-depth inspection of concealed elements of the facility's systems, and to estimate costs associated with correction of identified shortcomings and completion of the Laboratory.

This report provides a summary of the design analysis and its findings on a discipline-by-discipline basis. The report identifies and enumerates deficiencies requiring correction to bring the BSL-3 Laboratory up to accepted codes and standards. Also identified are recommendations for upgrades and corrections that may not be required by codes, but will improve the operating quality of the facility.

Under Phase 2 of its contract, Washington Group will provide the services and activities needed to bring the project to successful completion and operational commissioning. The content of this report will be reviewed with DPW to finalize the scope of work for Phase 2. After joint agreement on the scope of work and establishment of the budget for its execution, Washington Group will diligently pursue its expeditious completion.

Insofar as mechanical appears to be the major area yet requiring completion, Washington Group has pre-selected YMC Inc. to serve as the primary subcontractor on this BSL-3

project. They will provide and administer all other construction activities as subcontractors to them, except for door alignment, HVAC system balancing, and facility commissioning. YMC Inc. is a major mechanical contractor based in Meridian, Idaho that has a broad and diverse experience background in numerous projects with similar or more stringent quality requirements. The doors alignment and modifications work will be provided by Allied General Fire & Security, Inc., the local distributor for the Hirsh security equipment installed at the facility. Allied General performs routine maintenance work for H&W on the remainder of the laboratories facility and is quite familiar with its systems. The HVAC system balancing will be provided by Northwest Engineering Services, Inc. a NEBB member firm based in Portland, Oregon with extensive experiences on similar project types. Toombs & Associates, based in Denver Colorado, will provide the commissioning services for this project. They are intimately familiar with the Idaho BSL-3 laboratory from their previous involvement.

DESIGN REVIEW

A technical design review of the construction documents for the BSL-3 Laboratory was performed as a joint effort of the Boise, Idaho and Princeton, New Jersey offices of Washington Group. Technical personnel performing the review included Ron Toy (Process), Tom Moffett (Facility/Architecture), Paul Fu (Mechanical/HVAC/Controls), Dick Robertson (Architectural) and Al Munio (Mechanical/HVAC/Plumbing).

As the result of the review, Washington Group determined that the original design for the facility meets or exceeds NIH requirements for a BSL-3 laboratory. The Primary Procedures Room 113 and Shower Room 112, with the Ante Room 110 access, will actually meet BSL-4 facility requirements if proper gowning is provided. Note that Washington Group obtained planned operating protocol and facilities usage data from interviews of operating personnel during the physical inspections of the facility. These operational protocols and safety practices for operating a BSL-3 facility to achieve full compliance with NIH requirements for biosafety in microbiological and biomedical laboratories are normally available to assist the design team during the design process.

Ante Room 110 and Emergency Exit 119 provide the separation required from the remainder of the laboratory facility. Access is controlled by electrically interlocked door hardware that establishes both rooms as airlocks and provides the mandated separation.

The mechanical and HVAC systems for the facility were designed to provide the proper separation, isolation, HEPA filter protection, air exhaust and decontamination control of solids and liquids from the laboratories. Redundant makeup air units, exhaust fans, and HEPA filter units are provided to improve reliability and allow sustained laboratory usage in the event of failure of the primary unit.

The Building Automation System (BAS), as designed, is adequate to control the HVAC systems within the desired environmental ranges. The BAS also monitors differential pressure between rooms and alerts occupants of upsets, to ensure that required airflows critical to occupant safety are maintained.

The BSL-3 Laboratory is provided with separate supply air and exhaust air equipment to allow autonomous operation virtually independent from the mechanical systems serving the balance of the Idaho Laboratories complex it cohabitates. The BSL-3 laboratory contains seven Baker biological safety cabinets; two hard ducted Sterilchemgard units, and five thimble ducted SterilGARD III units. Dedicated exhaust fans EF-1 and EF-2 located on the roof of the penthouse structure serve the two SterilchemGARD III units. The five SterilGARD III units are combined with general area exhausts from the laboratory area and served by exhaust fans EF-3 and EF-4, also located on the penthouse roof area. Each exhaust system is designed for operation with a single fan running and the second fan in cold standby status, to be automatically brought on line by the BAS upon detection of malfunction or failure of the operating fan.

Makeup air units MUA-1 and MUA-2, located on the roof of the laboratory complex, in combination with five constant volume reheat boxes located in the ceiling space of the BSL-3 laboratory, supplant the air exhausted and provide comfort conditioning for the facility. As with the exhaust fans, the facility is designed for one make up air unit operating, with the second unit in cold standby status to be automatically brought on line in the event of failure of the operating unit. Electrically fired steam humidification equipment is installed adjacent to each make up air unit and operates in concert with the unit to maintain BSL-3 occupancy areas at nominal 50 percent relative humidity.

For personnel safety and containment reasons, the BSL-3 laboratory is maintained at negative pressure relative to the remainder of the laboratory complex. To achieve that negative pressure, the sum of the air exhausted by the two BSL-3 Laboratory exhaust systems is nominally maintained at 450 CFM greater than the air supplied to the laboratory by the operating make up air unit. That 450 CFM is introduced at four interface doors to the laboratory complex in quantities of 200 CFM into Specimen Receiving Room 107, 100 CFM into Ante Room 110, 100 CFM into Emergency Exit 119, and 50 CFM into Gas Cylinder Storage Room 109. With the exception of the Gas Cylinder Storage Room, each of the above air introduction points is monitored both locally and centrally by the BAS to ensure maintenance of the negative pressure parameter desired within the BSL-3 Laboratory.

Within the BSL-3 Laboratory, controlled airflow patterns are critical to ensuring potential contaminant containment and operating personnel safety. The Bio-Safety Cabinets located in BSL-3 Primary Procedure Room 113, Bac-T Virology Room 117, and TB/Mycology Room 118 are the primary exhaust locations, thus those rooms are at the greatest depression within the BSL-3 Laboratory area. Similar to the monitoring described above at the interface points to the laboratory complex, the access door into each room from Work Room 114 is fitted with a differential pressure transmitter to monitor and report its depression, both locally and remotely by the BAS. Differential pressure monitors are also installed on the doors between Shower Room 112 and BSL-3 Primary Procedures Room 113, Between Ante Room 110 and Work Room 114, and between Emergency Exit 119 and Work Room 114 to ensure sustained operation in conformance with containment and safety procedures.

Liquid waste streams generated within the BSL-3 laboratory are maintained separately from sanitary and laboratory wastes generated in the remainder of the laboratory facility. The BSL-3 laboratory wastes are collected in a dedicated vessel located in the basement to allow monitoring, decontamination, and neutralization as required, before disposal to the sewer system.

While the design for the BSL-3 laboratory has been determined to be generally sound and compliant with applicable codes and standards, the Contractor was apparently unable to bring the construction effort to completion and commissioning. Several areas of incompleteness and failure to conform to the specified criteria have been identified and are discussed in detail below. However, as averred above, Washington Group was unable to identify a design deficiency that would preclude completion and commissioning and expects to achieve satisfactory completion and commissioning within the parameters reflected by the design documents when the identified construction deficiencies are remedied.

The completion shortcomings, quality deficiencies, and modifications recommended to bring the construction effort into compliance with the design that were identified during physical inspection of the BSL-3 laboratory facility are discussed below on a discipline specific basis. In addition, Washington Group identified a few areas where minor modifications or additions will improve the operational reliability of the systems. They too are enumerated below under their applicable discipline.

Architectural

The site inspection of BSL-3 laboratories on October 11th and 12th provided the following observations. Laboratory finishes for floors, walls and ceilings meet cleanability and decontamination requirements per NIH guidelines. The laboratory casework and shelving are metal with an enameled paint finish. The countertops and work surfaces are stainless steel. All these surfaces are acceptable for a BSL environment. Workmanship deficiencies were noted however, in several areas. Gaps between casework countertops and wall surfaces varied greatly, from less than 1/4" to more than 1" in some areas. In one area where the gap exceeded the ability of caulking to cover, a stainless steel cover strip was super-imposed as an attempt to make the appearance tolerable. Caulking around door trim extends far beyond the trim onto the wall surface. There are also indications that the caulking materials used may not be compatible with the paint that was applied, as there appears to be bleed-through. Shelving design does not conform to specified seismic and containment parameters. Stainless steel countertops are not seamless as specified. Neither the shelving nor the countertops are affixed to their support structures as required for seismic restraint.

The use of wood doors in a BSL facility is not normally the preferred choice in the industry, due to the decontamination required of all surfaces in a BSL environment. The door finishes are heavily sealed with a clear finish, but over time and repeated decontamination cycles, this finish may wear off exposing the wood door to impregnation

of organisms, cleaning and decontamination agents. A rigorous maintenance program is warranted to preclude future problems. In addition, the wood doors appeared to be warped in some of the openings and in general the doors did not seal properly in the doorframe in almost all of the door openings. Perhaps there are some adjustments that can be made to the hardware and door alignment to correct the door gaps and continuous seal contact.

Flows for People, Material or Waste were reviewed on site with laboratory facility operations. Although not uniflow, the operational flows are acceptable and defined for intended use. They must be implemented with procedure protocols and laboratory training by the laboratory management.

ADA Compliance review for this BSL-3 laboratory indicates three areas that vary from ADA requirements; Ante Room 110, Emergency Exit 119, and Shower Rooms 111 and 112. The issues in most cases are the required clearances for approaches to doors and clear floor space in front of the showers. The shower is actually a BSL-4 requirement and not a requirement of a BSL-3 laboratory, but the Primary Procedure Room is intended for BSL-3+ uses. BSL-3 usually requires only a sink for washing upon exiting. Shower Rooms 111 and 112 cannot achieve ADA compliance in their current configuration.

Following is detailed discussion and the Washington Group recommendations for the major items requiring correction and/or completion.

1. **Issue -- ADA Compliance:** If the requirements of 28CFR Part 36 "ADA Standards for Accessible Design" are applicable to this BSL-3 Laboratory, the facility as-constructed, appears to contain variances in Ante Room 110, Emergency Exit 119, and Shower Rooms 111 and 112. The first approach is to consider whether or not the handling and processing of potentially bio-hazardous materials precludes a disabled person from working and using this BSL-3 laboratory portion of the facility. It is unlikely that anyone in a position of authority would or could make that determination, and if they did, proponents of potential future disabled users would likely challenge the decision.

The International Building Code (IBC), Chapter 11 -- Accessibility, does not appear to relieve this type of facility from compliance with the requirements of the ADA, based on occupancy or any other reason. No examples could be found in Chapter 11 that might apply to this or similar facilities exempting it from meeting accessibility requirements.

Assuming then that the goal is to make this portion of the facility accessible, conforming to the ADA requirements, Washington Group explored the physical changes needed to achieve compliance as described below.

Ante Room 110 has clear inside dimension of about 7'-6" in the east/west direction, which conforms to ADA accessibility requirements. However, one possible issue is

the approach to Door 110B from inside ROOM 110. For that door, swinging into the space, there should be 18" clear between any obstruction and the strike side of the door opening.

Shower Rooms 111 and 112 each feature a sink and wardrobe locker, and are connected by a shower accessed from both rooms. Because of door swings into Room 112, adequate clear space is not provided in front of the shower, because both Door 112A and the shower door itself encroach into the required clear space. Also, as-built measurements indicate that the shower doors themselves do not provide the required 32" clear when open. Replacing the shower doors with units that achieve the 32" clear opening would provide ADA passage clearances, or eliminating the shower doors and replacing them with curtains might satisfy the requirement, but adequate clear space in front of Door 112A still remains an issue. Note also, that an access problem exists at both sinks in Shower Rooms 111 and 112. A nominal 8" x 8" stainless steel access panel is installed in the wall behind each sink to provide access to the concealed shutoff valves. However, each panel is centered behind the gooseneck faucet affixed to the sink, and the gooseneck faucet must be removed to allow the access panel to open.

Emergency Exit 119 appears to conform to all accessibility requirements except for its overall dimension in the east/west direction. The construction documents indicate a clear inside dimension of about 6'-6". With a 3'-6" door swinging into the space and an additional 48" clear space requirement beyond the door swing, the required total clear inside dimension would be 90" or 7'-6". Any reconfiguration of this room would likely have to occur to the east because of the impact on door approach clearances required at Door No. 118A into Laboratory 118. However, moving the east wall of Emergency Exit 119 could also create a conflict with the equipment shown in Vestibule 120. The space within Emergency Exit 119 does have ample room in the north/south direction, creating a large wheelchair maneuvering area, which could mitigate the east/west dimension issue. This should be a favorable factor in seeking an exemption to the strict requirements if expansion of the room in either direction is deemed impossible or impractical.

Recommendation: Given the advanced state of completion of the laboratory, and if full ADA compliance could be waived, replacement of the non-compliant shower doors installed between Shower Rooms 111 and 112 with units that provide the specified 36" width and the ADA recommended 32" minimum passage clearance would be the least traumatic remedy. Modification of the shower wing walls would be necessary to accommodate the new doors. No other changes would be needed.

However, on the basis that ADA compliance will not be waived, Ante Room 110 conforms in all respects except the 18" clear wall area on the striker side of door 118B. Washington Group believes that installation of automatic door operators would mollify the need for the extended wall clearance and gain acceptance. If strict adherence is mandated however, it will be necessary to modify the gowning cabinetry along the south wall to provide the required clearance.

Shower Rooms 111 and 112 will require total reconfiguration of the two rooms to achieve ADA compliance. That reconfiguration may create problems with other program requirements in terms of wardrobe lockers and sinks. By moving the sink (or sinks) and the shower to the south wall, the required ADA clearances can be met. But this would result in the loss of one wardrobe locker or sink because of the limited space on that south wall. A preliminary sketch is provided in Appendix B to this document that shows a possible reconfiguration of Shower Rooms 111 and 112 that could achieve ADA compliance.

Emergency Exit 119 would also require complete reconfiguration to provide the required clearances in strict compliance with ADA standards. The east wall would move about 14" farther east, door 119B would therefore have to relocate south to avert intrusion into the service and access areas required for the autoclave in TB/Mycology Room 118, and the cabinetry on the south wall of Room 119 would have to relocate to the north wall. Because there is ample wheel chair maneuvering area within the room; albeit to the side of the doors rather than linearly, Washington Group believes that installation of automatic door operators would satisfy the intent of the ADA access standards and recommends pursuit of that approach.

2. **Issue – Wood Doors and Access Control System:** During design review, the use of wood doors in the laboratory areas surfaced as a concern for proper decontamination. Similar concerns were voiced in correspondences from contractors and their consultants. Warping is evident on several of the doors. Problems exist related to proper door alignment and adjustment. The key lock system on door 113A is non-functional and will not accept a key. Installation of hardware and wiring for the door access system in the ceiling space is incomplete; components are not affixed to structure, wiring is not installed in a workman like manner, enclosures are not provided, and/or enclosure covers are not installed.

Recommendation: Upon physical inspection of the facility, the quality and integrity of the surface treatment on these doors quieted concerns and verified that decontamination of the door surfaces can be effectively achieved, at least initially. The wood doors will require constant and ongoing monitoring of the sealed finish and a dedicated maintenance program to assure long-term protection from organisms and decontamination agents. After inspection and test, it appears the doors can be adequately adjusted to allow the ventilation system to overcome the potential problems caused by the door warping. Washington Group proposes to complete the installation and adjust the doors and hardware to fulfill the intent of the design documents

3. **Issue – Ceiling Access Panels:** The ceiling access panels installed in Work Room 114 and in Clinical Sample Storage Room 107 are cumbersome to operate and leak air. There are about 5 panels in Work Room 114 and 3 in Clinical Sample Storage Room 107. Another access panel is needed to allow access to valves in existing piping systems serving the balance of the Laboratory Facilities Complex.
- Recommendation:** While the panels are difficult to operate, Washington Group feels they are adequate, insofar as the need for access should be infrequent after the

construction deficiencies identified in the BSL-3 facility are remedied and the facility is commissioned. The air leakage problem is a by-product of the deficiencies in the HVAC ductwork system. When those deficiencies are corrected, air leakage should be minimal. Washington Group will inspect and repair or replace the gaskets on these access doors to improve their integrity. The additional access panel to serve the existing piping system valves will be installed.

4. **Issue --Laboratory Casework Installation Tolerances:** Inspection of the casework installation throughout the BSL-3 laboratory facilities revealed abnormally wide variation in tolerances between the casework backsplashes and the walls to which they abut. Whereas plus or minus 1/4" would be normally expected with the construction methods employed, gaps exceeding 1" were witnessed. In some instances, supplementary stainless steel strips were applied because the gap exceeded the closure capability of the caulking.
Recommendation: While quality of workmanship may be at the root of the problem, Washington Group proposes to pursue realignment of the casework to reduce variances and/or provide closure plates to improve the appearance aesthetics of the installation.
5. **Issue -- Caulking and Painting Quality:** During review and inspection of the aforementioned casework installation, it was noted that the painted surfaces of the caulking were soft and sticky; possibly indicative of non-compatibility between the caulk product applied and the paint. Insofar as more than 6 months have expired since their application; compatible products should be well cured, with a hard cleanable surface. It was also noted at some door trims that the caulk had not been trimmed and it extended erratically well out from the trim onto the wall surface.
Recommendation: The conditions witnessed may be indicative that a non-paintable caulk product was applied. Washington Group intends to further investigate the quality of the product applied during casework realignment efforts. If non-paintable caulk was applied, it will be removed and replaced with a suitable product.
6. **Issue -- Pass-Through Capability, Clinical Sample Storage Room 107 to Primary Procedure Room 108:** The original design basis for delivery of samples from storage to the laboratory was through the autoclave, which was to double as a pass through. Due to a procurement error however, the control cycle of this autoclave will not allow its use for pass through purposes. An electronic lock out in the unit's control circuit requires initiation and completion of the sterilization cycle before opposite doors can be opened.
Recommendation: Washington Group solicited advices and assistance from Consolidated Still and Sterilizer, the autoclave manufacturer, and Johnson's Medical, Consolidated's area representative, to determine whether the autoclave can be modified to allow its dual use as an autoclave and a pass-through. Consolidated advises that the desired pass-through capability is achievable, but will require development of special programming to accomplish. Because a possibility of cross-contamination will exist after elimination of the mandatory sterilization cycle, Consolidated will require formal documentation from H&W acknowledging their

cognizance of the contamination issue and requesting the modification.

A primary design objective for Primary Procedures Room 108 is to minimize penetrations in the room's enclosing structure as a key contamination control measure. While eliminating the need to sterilize between door openings does increase the cross-contamination potential, other options would be an even greater compromise of that important design objective; therefore Washington Group proposes to implement the modification. While Consolidated alleges an electronics technician could accomplish the installation, Washington Group believes the Lab's interests will be better served if the installation and check out of the modification software is performed by technicians cognizant with the operating cycles of autoclaves, and therefore proposes to have Johnson's Medical perform the modification and check out of the autoclave.

7. **Issue – Commissioning the BSL-3 Laboratory:** Upon completion of the construction, repair, and modification activities, including testing and balancing of the HVAC systems, a professional commissioning entity must verify that the completed work activities conform to the design intent and satisfy NIH requirements. **Recommendation:** Washington Group proposes to retain Toombs & Associates as the commissioning agent for the BSL-3 Laboratory. Toombs & Associates had been designated to perform the commissioning activities originally on the project, but the completion level never reached the point of commissioning readiness. Mike Dormand, the Toombs agent for the BSL-3 facility is intimately familiar with the design and its systems, and had physically visited the project site twice during its construction. During his visits, Mr. Dormand provided constructive input related to resolving the problems then being encountered, and had demonstrated the operability of the system. Though Mr. Dormand was intimately involved with the project, his involvement and reporting responsibility was independent from the construction team. Mr. Dormand has offered supportive advice and assistance during Washington Group's design review efforts. His continued involvement as the commissioning agent will be an asset to the BSL-3 Laboratory.
8. **Issue — Fire Extinguishers:** Section 10522 specifies 42" AFF mounting height for the fire extinguisher handle, which conforms to ADA.AG guidelines. ADA.AG guidelines also limit top of cabinet height to 54" AFF, when cabinets are employed. Installed heights for the units in the BSL-3 laboratory exceed 48" for the extinguisher handle, with the top of cabinet dimension well above the 54" recommendation. Cabinet frame construction is also not welded construction as specified, and fasteners are not of compatible material, nor are they countersunk as specified. **Recommendation:** In order to bring the fire extinguishers and their cabinets into conformance with ADA.AG recommendations and specified criteria, Washington Group proposes to reset the equipment to conform to the 42" AFF and 54" AFF dimensional criteria. In concert with the resetting of the cabinets, frames will be welded. Attachment screws of compatible quality and countersunk design will be installed.

9. **Issue – Shelving Design:** Section 12345 specifies that open shelves are to be provided with a lip to provide seismic restraint and containment for reagent containers. Details are included on the drawings to help define the requirement.

Unistrut support channels are to be provided with finish cover plates.

Recommendation: Washington Group proposes to contract with YMC, Inc. to fabricate and install new shelving that meets the requirements of the specifications and drawings. The new shelving will be powder coat finished to match the finish of the cabinetry.

Mechanical

While the Washington Group design review team has confirmed that the mechanical HVAC systems for the Idaho BSL-3 Laboratory described above were designed in general conformance with National Institute of Health (NIH) guidelines for BSL-3 facilities, several problem areas were identified with the installation that require completion or modification to permit the system to function in conformance with the design intent. Following are brief summaries of the problems identified and their proposed resolutions. A few areas were also identified where the system can function as designed, but where Washington Group suggests upgrades to improve the operability and/or responsiveness of the system. Descriptions of those upgrades proposed by Washington Group to improve operation and successful commissioning of the BSL-3 Laboratory also follow.

1. **Issue – Air Leakage in Ceiling Space:** There is significant airflow in the equipment space above the finished ceiling which is especially noticeable as a downdraft when an access panel is opened. Upon inspection, the major source appears to be leakage from the medium pressure supply ductwork on the inlet side of the VAV box, between the MUA and CV box, and possibly the low-pressure supply ductwork between the CV box and the air terminal. Leakage was also witnessed from the CV box casings and their access panels.

Recommendation: Washington Group proposes to contract with YMC, Inc. to physically inspect and test the entire supply duct system from its entry point into the building to the ceiling diffuser terminals, including the CV boxes. To the extent achievable, the medium and low-pressure duct systems will be pressure tested before and after repair work is performed. All identified leaks will be sealed to minimize leakage of tramp air into the ceiling space. Where possible, access panels on the CV boxes will be removed, new gaskets installed, and the panels replaced.

2. **Issue – Change out of the 95% Efficiency Filters in MUA-1 and MUA-2:** As presently configured, the 12" deep 95% efficiency filters in the makeup air units are virtually impossible to replace, as the belt and housing guards for the fans are within about 8" of the face of the filter.

Recommendation: Washington Group proposes to move the filter retainer frame bank 12" to 18" downstream to allow adequate access to effect filters change out. To accomplish that filter frames relocation, it will also be necessary to relocate the steam humidification manifold a similar distance downstream and to reroute the steam

piping between the humidifier and the manifold. That piping reroute will also require relocation of the penetration through the MUA wall. The existing hole will be repaired and painted to match the existing.

3. **Issue – Supply Air Damper Leakage:** During onsite inspections of the mechanical systems, significant leakage through the motorized supply dampers, into the idle MUA was noted. Though the motorized supply dampers were specified to be integral to the MUA and specified in section 15721, the dampers are mounted in the discharge ductwork downstream of the units. Further, access doors at these dampers were specified in section 15800, but they were not installed, thus it is impossible to determine the manufacture and quality of these dampers. Leakage through dampers conforming to section 15721 should not exceed about 25 CFM; however witnessed leakage is estimated to be more than 10 times that amount.

Recommendation: As part of its investigation effort, Washington Group requested YMC, Inc. to install access doors as specified in section 15800 in the ductwork in proximity to these dampers, to allow their inspection. The installed dampers are extruded aluminum low leakage units that meet the requirements specified in section 15721, but they are poorly installed and are not sealed to the duct wall. As the result, a substantial quantity of air bypasses the damper when closed, causing the problem. Washington Group proposes to have YMC Inc. complete the damper installation to conform to the damper manufacturer's recommendations and the specified requirements.

4. **Issue – HVAC System Testing and Balancing:** Though the design review verified that the concepts reflected by the construction documents conform to NIH requirements for the BSL-3 laboratory usage intended, implementation of those concepts and commissioning of the systems has proven to be difficult. Prior efforts of the contractors failed to achieve the integrated operation of the HVAC supply and exhaust systems needed. A key element of system balancing is proper operation of the BSC's, especially the two hard-ducted units in Primary Procedure Room 113. All of the BSC's were factory calibrated prior to shipment, however available documentation indicates that the factory settings have been altered.

Recommendation: Washington Group proposes to retain Northwest Engineering Services, Inc. (NWESI), a professional testing and balancing entity to perform the HVAC system testing and balancing. NWESI is a NEBB member firm with extensive experiences on projects similar to the BSL-3 Laboratory requiring maintenance of critical airflow patterns. An early goal of the balancing effort will be to restore the BSC settings to the range of acceptable values listed on the factory calibration reports by the manufacturer. Subsequent to successful completion of the HVAC system testing and balancing and the commissioning activities, Asepsis Air Control will certify the BSC's for operation.

5. **Issue – Calibration of the Ebtron Flow Measurement Stations:** The calibration settings of the Ebtron flow measurement stations employed as the primary method of control for exhaust fan capacity and MUA capacity have apparently been altered and are not providing accurate readout data. Ebtron flow stations are factory calibrated in

accordance with NIST standards and are intended for "plug and play" application, when installed per Ebtron recommendations.

Recommendation: Technical services at the Ebtron factory advise that the units can be readily restored to the factory calibration settings. Washington Group proposes to contract with YMC, Inc. and their subcontractor, Total System Services, to recalibrate the existing units in compliance with Ebtron provided procedures. If residual problems are encountered due to components damage, the faulty components will be replaced.

6. **Issue – Magnehelic Gauges on HEPA Filter Housings:** During a mechanical inspection, the magnehelic differential pressure gauges on both HEPA filter housings on the inlet ductwork to EF-1 and EF-2 were found to be non-operative.

Recommendation: Washington Group proposes to verify the condition of these magnehelic gauges and repair or replace as warranted to restore them to operational status.

7. **Issue – MUA-1 and MUA-2 Capacity Control:** Section 15920 specifies that fan speed be modulated to maintain control volume as the basis of control for MUA-1 and MUA-2. Section 15920 also specifies that the CV/VAV terminal units be controlled to maintain constant volume. Though the system can be made to operate as specified, it may be vulnerable to unstable operation as upsets and variations in space conditions occur, such as reduced flow and BSC decontamination activities.

Recommendation: Washington Group proposes to control MUA-1 and MUA-2 fan speed based on static pressure in the supply ductwork downstream of the MUA units. With constant pressure in the supply ductwork, unit capacity will be efficiently controlled in response to the demands of the CV/VAV terminal units; be it the normal constant volume control scenario, or an upset condition such as reduced flow or BSC decontamination. The installed fan capacity monitoring equipment will be retained for the equipment and system status monitoring functions specified.

8. **Issue – MUA-1 and MUA-2 Changeover Time:** No time parameters are specified for operational changeover from MUA-1 to MUA-2 or vice versa, the control cycle specified for these units is the industry standard, and the damper operators are as specified. The time required for a 90-degree operating cycle for each installed Belimo damper operator is 150 seconds. As the result, the witnessed time requirement for changeover of operation between the MUA's is currently about 7 minutes. The time requirement for changeover between exhaust fans is about 3 minutes. While the system may be able to accommodate those time parameters for orderly changeover during non-occupancy periods, they create safety concerns if a unit failure occurs during normal laboratory occupancy times or if emergency laboratory operations occur simultaneous with the scheduled changeover. Normal industry accepted parameters for equipment changeovers are about 1 minute.

Recommendations: Washington Group proposes to replace the existing damper actuators on the control dampers for the MUA's and the EF's with actuators that have time requirements for a 90-degree operating cycle of less than 20 seconds. Retaining the specified control cycle for the equipment, the resulting changeover times will be

about 1 minute for the MUA's, and less for the EF's.

9. **Issue – Seismic Restraints on BSC's:** Specification section 11601 required seismic anchoring of the BSC's, and further required detailed drawings of the proposed seismic anchoring systems with supporting calculations stamped and signed by a registered structural engineer. The Baker Company, manufacturer of the BSC's, offers both wall and floor seismic restraints as available options for their hoods, depending on the results of the site specific seismic analysis. The wall type restraints were furnished by Baker with all their cabinets for the BSL-3 Laboratory. The restraints are installed on the four BSC's mounted against interior partition walls in the Bac-T/Virology Lab and the TB/Mycology Lab. No restraints are installed on the two BSC's abutting the exterior wall in the Primary Procedure Room, and the Baker furnished restraints are not installed on the hood in the Clinical Sample Storage Room, but 4 clip angles are affixed to the feet of this hood. Neither the specified seismic calculations nor the installation drawings have been located. Questions exist regarding the adequacy of the installed seismic restraints for the criteria applicable to the Idaho BSL-3 Laboratory. Further, determinations and recommendations must be developed for the hoods that are without seismic restraints.

Recommendations: Washington Group proposes to have a licensed structural engineer analyze and verify the suitability of the seismic restraints for application to the BSL-3 structure in conformance with section 11601 requirements and applicable codes. Insofar as the wall to which the four BAC's are anchored is a gypsum board over metal studs wall, it may not achieve Code seismic requirements. Evaluations and recommendations will be developed for the more appropriate method of anchoring and its integration into the BSL-3 structure.

10. **Issue – Humidifier Blow Down Drain Freeze Protection:** Bare copper drain lines are routed from each humidifier to the nearest roof drain, a distance of 40 to 50 feet. The internal control system for the humidifiers will automatically initiate a drain cycle at intervals between 1 and 24 hours, adjustable to suit humidifier usage and supply water quality. Detailed inspection also indicated inconsistent grade in parts of the system that will not allow efficient draining of the system. There is potential for freezing of these drain lines during severe cold periods.

Recommendations: Washington Group proposes to modify both drain lines to provide consistent draining ability, and to insulate the systems full length with closed cell polyurethane insulation and finished with a weather resistant vinyl jacket to reduce the rate of cooling and freeze potential during cold weather.

11. **Issue – Condensate in Plumbing Vent HEPA Housing:** Bag-in/bag-out HEPA filter unit F-3 was added to the scope of section 15800 in Addendum 3 to prevent release of biological contaminants to the atmosphere through the laboratory plumbing system vents. The specified unit was furnished and is a single wall stainless steel housing unit installed outdoors on the roof of the facility. During inspection, large amounts of condensate were noted within the unit from exposure of the vent gases to the cold walls of the housing. A drain valve is installed, but insofar as the housing sits directly on the roof surface, the valve is also very close to the roof surface and the

only option is to discharge accumulated liquids onto the roof surface.

Recommendations: Though the potential contaminated waste streams produced in the BSL-3 laboratory are biological waste, Washington Group believes that the procedures and practices applicable to hazardous waste management are prudent for application. In that regard, for design purposes, wastes generated upstream of the HEPA filter are considered contaminated until proven clean by test. Therefore, the condensate formed within the housing is a liquid waste stream generated by the process with no means of capture or treatment. Washington Group explored insulation of the housing, and insulation and heat tracing of the housing as potential remedies. Insulating the housing would merely reduce the quantity of condensate generated but would not eliminate it, thus was deemed unacceptable. The heat trace and insulate option is therefore proposed as the most cost effective resolution of the problem. A third option of providing a heated enclosure was quickly dismissed because of excessive cost. Washington Group proposes to insulate and heat trace the housing of HEPA filter housing F-3. The heat trace capacity will be sized to maintain all surfaces and the internal chamber of the housing above the dew point of the vent gases, which are assumed for design purposes, to be saturated at room temperature. The design temperature for heat trace sizing is therefore 75-degrees F. Insulation thickness will be optimized to minimize energy use. Multiple layers of closed cell urethane foam insulation covered with a weather resistant PVC jacket will be used.

Provisions should also be made to safely collect condensate from the housing drain valve in the event an upset such as a power outage or equipment failure results in a condensation condition. Washington Group suggests that housing F-3 should be supported on a grated platform to elevate it 18" to 24" above the roof. The platform should be large enough to allow filter service and removal around its perimeter. A handrail around the platform may be warranted. Further, under normal operation, condensate may yet occur in the discharge vent piping, therefore a low point drain coupling or drip leg should be added. At that point any condensate accrued is not contaminated and can be released to the roof surface without reservation. At completion of the aforementioned modifications, the discharge vent pipe will be fitted with a support for stability.

- 12. Issue – Basement Located Waste Water Collection Tank:** A single wastewater tank is located in the basement for collection of all liquid wastes generated in the BSL-3 Laboratory. The tank is equipped with a pump to allow discharge to the sewer system when disposal is warranted. However no formal disposal procedure has apparently been established. The installed system may require modification to not impede laboratory operations. In addition, special operations must be employed for decontamination and disposal of the accrued liquids, which could be cumbersome. Further, concurrence and acceptance by the regulatory agencies having jurisdiction does not appear to be documented.

Recommendations: Washington Group interfaced with the Boise City Public Works Department, the directly affected regulatory authority, for information and guidance on this matter, and with Dr. Hudson, the manager of the laboratory facilities to verify planned decontamination procedures. The City is amenable to accepting the waste

from the laboratory on the condition that the system and its operating procedure include provisions for isolation and treatment, then verification by test prior to release to the city sewer system. Positive mixing methods must be employed during the decontamination process to ensure complete neutralization. The pH of the effluent is also a concern of the Public Works Department. They also request application of secondary containment within the system to preclude accidental release of contaminated wastes into the City sewer system. A copy of the Washington Group letter of understanding to Boise City is provided in the Appendix to this document for reference. Dr. Hudson averred that super-chlorination is the prevalent decontamination method that will be employed on the wastes from the BSL-3 Laboratory, and that retention times of 4 to 6 hours will ensure the desired neutralization results.

After integration and analysis of the combined inputs from the interviewed parties, Washington Group determined that the existing single tank installed will suffice for the application provided that the decontamination and disposal processes are scheduled and achieved during periods of non-occupancy for the BSL-3 Laboratory, such as nights or weekends. To achieve the positive mixing process required by Boise City in the existing tank, Washington Group proposes to install a multi-nozzle spray tree internal to the tank, near the top. A 3-way ball valve will be installed in the pump discharge piping to allow its use for recirculation and mixing during the decontamination process. After expiration of the 4 to 6 hour retention time and verification of neutralization success, the 3-way valve will be redirected to allow pump discharge to the City sewer system. The installed pump has a nameplate capacity of 12 GPM @ 23' TDH; about 1/3 the originally specified capacity and inadequate to effect thorough mixing of the neutralizing liquid with the tank contents to the satisfaction of the City Department of Public Works. Washington Group therefore proposes to install a replacement pump of comparable chemical resistant construction, but with volumetric capacity of about 35 GPM. To allow orderly scheduling of the decontamination process during non-occupancy periods, additional level switches will be installed in the tank to initiate an alarm to the facilities manager when the liquid in the tank reaches a predetermined level (e.g. 60 percent full).

After physical inspection of the basement area inhabited by the tank, Washington Group determined that the requested secondary containment can be best accomplished by installing containment curbs around the existing sump pump basin and the existing floor drain near the air handling unit. This will preclude accidental release of contaminated liquids into the sewer system, and at the same time will allow unimpeded access to the storage tank and pump systems for operation during decontamination and disposal operations. To allow orderly and safe delivery of hypochlorite solution to the wastewater tank, a 30-gallon solution-mixing tank with agitator and metering pump will be installed adjacent to the storage tank and piped for direct delivery of the hypochlorite solution into the recirculation system.

Upon completion of the above modifications, Washington Group will prepare written procedures to achieve the decontamination and liquid disposal operations. A copy

will be provided to the Boise City Department of Public Works as a courtesy to verify that the system fulfills their needs.

13. **Issue – Seismic Design for Mechanical Hangers and Supports:** Sections 15050 and 15070 provide general support and seismic criteria to be applied to equipment supports, piping systems, and ductwork systems and specifies review and certification of specific applications by a licensed professional engineer. Those requirements are then referenced in the other division 15 sections of the specifications for applicability. The certifications of compliance must be submitted for review and approval; thereby becoming part of the project record. Upon inspection of the installed systems, no evidence of compliance with the specified seismic hanger types was evident, and the required documentation of analysis and certification by a registered structural engineer appeared to be absent from project records.

Recommendation: Washington Group proposes to have a registered professional structural engineer perform the specified seismic analyses and support designs. If deficiencies are encountered, Washington Group will contract with YMC to upgrade the equipment, piping, and ductwork system supports as required to meet specified requirements.

14. **Issue – Isolation Dampers on BSC's:** Section 11601 specified airtight dampers to prevent leakage of gases during decontamination for all BSC's. Review comments affixed to the submittal package for the BSC's reiterated the isolation damper requirement and notated their location. Based on the equipment installed however, apparently those review comments were not incorporated, and duct mounted isolation dampers were instead furnished and installed for all 7 BSC's. Those dampers are suitable for sealing and isolating the 2 hard-ducted hoods in the Primary Procedures Room, however the other 5 BSC's are all thimble-connected and the duct-mounted dampers are superfluous for isolation purposes during decontamination operations. In addition, after detailed inspection, the seals on several of the dampers, including the dampers on the 2 hoods in the Primary Procedures Room, were found to be damaged, apparently because during installation the connecting duct was extended too far into the damper body and interfered with the damper during operation.

Recommendations: A gasketed sealing plate (knife gate) is offered by The Baker Company as an optional accessory for isolation on thimble-connected units, which erroneously was not provided on the BSL-3 hoods. After discussions with Baker, the required retrofit components are available, though their installation onto the finished cabinets is much more difficult than installation during manufacture. Washington Group proposes to coordinate and contract with YMC, Inc. to procure and install the required sealing plates and their operating and storage frames from Baker to satisfy BSC isolation requirements for decontamination. The damaged dampers on the thimble-connected hoods will be repaired or replaced to restore their intended integrity. The damaged dampers in the Primary Procedure Room will be replaced with new units to provide the required isolation capability for decontamination.

15. **Issue – BAS Calibration and Final Tuning:** With minor exceptions, the hardware specified and required for the BAS has been furnished and installed. Basic

programming has also been developed and installed. However, few calibration activities have been accomplished and the system must be fine-tuned, including modifications to the programming to achieve specified operational parameters.

Recommendations: Washington Group intends to contract with YMC Inc. and their subcontractor, Total System Services, to complete the BAS installation, calibration, and fine-tuning. Total System Services is a recognized controls subcontractor that is conversant in application and setup of Alerton control systems. They will complete, calibrate, and fine-tune the installed Alerton control system to achieve specified controls parameters. The BAS refinements and improvements noted elsewhere in this report will also be incorporated into the system and fine-tuned.

16. **Issue -- Solenoid Valves on MUA Preheat Coils:** Section 15920 and drawing M6.1 specify a normally closed solenoid valve in the heating glycol fluid supply to each MUA, so that heating glycol fluid flows only to the active MUA. Redundant heating glycol pumps P-1 and P- 2 are sized to circulate only the amount of glycol fluid required by the active MUA. Due to nuisance tripping of the heating glycol system relief valve in the basement however, the solenoid valves were rewired so that both are routinely open whenever either MUA is operative.

Recommendation: With the circuits to both MUA units constantly open; the active unit is vulnerable to being unable to maintain desired discharge air temperatures at design conditions, due to inadequate heating glycol fluid supply. Washington Group recommends that the valves be restored to their specified operating mode. If the nuisance tripping of the relief valve persists, the valve will be reset to a higher pressure or replaced by a new valve with a higher-pressure setting, to eliminate the problem.

17. **Issue -- Temperature Sensor in MUA Fan Inlet Plenum:** Section 15950 specifies a temperature sensor to be located in the fan inlet plenum of the MUA fan to modulate the 3-way control valve on the preheat coil to maintain the required fan inlet temperature. The sensor is not reflected on the BSL-3 Air Handling Systems Control Diagrams, nor is it installed.

Recommendation: Washington Group considers the specified control sequence the most viable, given the parameters applied for sizing the pumps and heat exchanger; thus will contract with YMC, Inc. and Total System Services to install the temperature sensor to provide the control sequence specified in the original design.

18. **Issue -- Commissioning of Air Conditioning Equipment:** Section 15670 specified factory start-up and operator training for the air-cooled condensing unit. Section 15670 also required verification of completion to the commissioning as well as providing assistance to the commissioning agent to verify equipment performance. No documentation appears to exist to verify conformance to this specified requirement.

Recommendation: Washington Group proposes to perform the specified performance testing and complete the required documentation and operating personnel training. Washington Group will also interface with and assist the commissioning agent to verify that equipment performance satisfies specified

capacities.

19. **Issue – Condensate in Exhaust Ductwork:** The inlets to EF-1 and EF-2 consist of an extensive network of ductwork installed on the roof and external to the building. Insofar as the fans are redundant, with only one operating at a time, about 50-percent of the ductwork network is always idle and static. Humidification equipment is installed in the MUA's to maintain relative humidity at desired levels, with design capability up to 50 percent relative humidity at 70 degrees F space temperature. The ductwork is single wall stainless steel construction and non-insulated. Assuming occupied space conditions are maintained at the 70 degrees F 50-percent condition achievable, condensate can form within the ductwork whenever the outdoor temperature is below 48 degrees F, especially in the idle portion of the system.

Recommendation: As stated for the F-3 HEPA filter housing modifications, Washington Group believes that applying regulations and policies applicable to hazardous waste management is the prudent design approach for this potential biologically contaminated waste. In that regard, the air stream and any condensate wastes generated upstream of the HEPA filters should be considered contaminated until they are proven clean by test. A better approach is to minimize or eliminate the waste when possible. Washington Group therefore proposes to eliminate the potential formation of condensate upstream of the HEPA filter units by insulating and heat tracing the ductwork. The insulation and heat tracing will commence at the point of exit from the penthouse and extend to a point nominally 5' downstream of the HEPA filter housings, and will include the sound attenuator and the filter housings. The heat tracing will be sized to maintain 50 degrees F temperature within the ductwork at 0 degrees F outdoor temperature. HEPA filters are very susceptible to failure when exposed to water, especially as they become loaded, which is added justification for eliminating the condensate.

Condensate will yet occur in the ductwork downstream of the HEPA filter housings, but it can be assumed to be non-contaminated. Washington Group intends to install collection legs with traps and drain valves at the system low-points to allow its ongoing removal. The outdoors located ductwork for EF-3 and EF-4 is minimal, thus condensate formation will also be minimal compared to the EF-1 and EF-2 systems, but low point collection legs and drains will be installed to also allow its periodic removal.

20. **Issue – Damaged HEPA Filters in BSC's:** During detailed inspection of the HEPA filters in the BSC's, many were found damaged. Refer to the photographs in Appendix A to this document. Similarly, the HEPA filters in housings F-1, F-2, and F-3 are damaged or dirty, and the filter housings are dirty and were contaminated during installation operations. Again refer to the photographs in Appendix A. Both the prefilters and the 95-percent efficiency final filters in MUA-1 and MUA-2 are dirty.

Recommendation: As noted elsewhere in this document, major repair and modification work is required on most of the filter systems and their associated ductwork. At project completion and commissioning, Washington Group proposes to

contract with YMC Inc. to thoroughly clean the housings and replace all filters in the BSC's, housings F-1, F-2, and F-3, and the MUA's with new filters.

21. **Issue – Glycol Heating System Configuration:** The glycol heating system installed in the basement mechanical room is cumbersome and almost non-accessible for service. The glycol pot feeder is difficult to access. Recharge or addition of propylene glycol to the system is impractical if not impossible. Piping is not clearly identified. Floor and wall penetrations are sealed.

Recommendation: Washington Group proposes to contract with YMC Inc to modify and pipe the glycol system components to allow practical addition or recharge of the system when required. The pot feeder will be moved to an accessible location. Piping systems will be tested and affixed with identification labeling as specified. Glycol fluid percentages will be confirmed at 35-percent minimum to ensure freeze protection as specified. Isolation valves will be added to permit equipment service. All penetrations will be caulked and sealed.

22. **Issue – Integrity of Stainless Steel Exhaust Systems:** The exhaust system ductwork from the BSC's and the general exhaust in the Shower Room are specified to be fabricated from type 316L stainless steel. During inspection of the accessible portions of the duct systems, several irregularities were noted in weld quality and flange closure bolting. Washington Group therefore commissioned YMC, Inc. to perform in-depth inspection of these systems to ascertain their adequacy to support planned operations. Inspections were performed both internally and externally on the systems. Much of the ductwork is improperly or inadequately supported. Flange joints are randomly installed beyond specification allowances and are inadequately bolted, and in some instances appear to not be gasketed. Welds contain undercut and in some instances appear to be cold-lapped. Attachments to inlets and appliances are partially incomplete and/or are made with improper materials. A camera inspection of the duct interior reflected extensive sugaring of many of the welds, apparently indicative that the welds were performed without the proper shielding. Large quantities of dirt and foreign debris or contaminants exist in key portions of the duct system.

Recommendation: Washington Group proposes to contract with YMC Inc. to modify and repair the stainless steel duct systems for EF-1 and EF-2 as well as for EF-3 and EF-4 as required to bring them in compliance with applicable Codes and specified requirements, to permit safe operation of those systems. Damaged components and portions of ductwork will be repaired or replaced. Flange joints will be inspected, repaired, and regasketed as required. Unnecessary flange joints will be removed in concert with the repair and modification work, system hangers and supports will be upgraded to meet the seismic criteria specified in section 15070.

23. **Issue – Maintenance Manuals:** At termination of the construction contract for the BSL-3 facility, a random assortment of maintenance data was delivered to DPW. The materials are not inventoried and may not be all-inclusive for the equipment installed.

Recommendation: At completion of the project, Washington Group proposes to inventory the available data and secure any absent data for the existing equipment

along with the newly procured equipment, and compile it into informative and usable manuals for use by maintenance personnel.

Electrical

1. **Issue – Light Fixture Lens Gaps:** The light fixture lens casement and the fixture gasket at the ceiling requires an evaluation to determine if the fixtures are sealed properly to prevent leakage from the laboratory spaces. If the seal is sufficient, than the lens casement may require additional fasteners and perimeter sealant to eliminate the gaps where the ceiling fixture meets the ceiling. The gaps also are not conducive to easy decontamination and cleaning.

Recommendation: Washington Group proposes to remove every light fixture lens casement in the laboratories area, verify the seal integrity of the light fixture body to the ceiling structure, and replace the lens casement. New gaskets and/or additional retainer screws will be installed as warranted to provide a high integrity seal between the casement and the ceiling.

2. **Issue – High Level Switch in Waste Water Tank:** A high level switch is installed in the waste water storage tank in the basement to close solenoid vales in the hot and cold water supply lines to the BSL-3 laboratory in the event water level in the tank reaches its set point. The system's operation could not be confirmed during inspections.

Recommendation: Washington Group intends to install additional instrumentation into the wastewater storage tank as part of its proposed upgrade to satisfy Boise City Public Works Department concerns. The integrity and operability of the solenoid valve water shutoff system will be confirmed or completed in concert with the upgrade.

3. **Issue – Air Leakage at Switch and Convenience Outlet Wall Plates:** Air leakage into the BSL-3 Laboratory area was noted at several of the switch and convenience outlet cover plates.

Recommendation: Similar to the approach planned for the light fixture lens casements, the cover plates will be removed and gaskets installed or repaired as warranted to reduce the magnitude of the problem. When the ductwork is sealed to minimize air leakage into the ceiling space, the air leakage through cover plates will be inherently reduced in magnitude.

4. **Issue – Electrical Hardware Locations:** Several instances of convenience outlets or junction boxes located partially behind casework cabinetry were noted, and wiring raceways are misaligned (see photographs in Appendix A).

Recommendation: As part of the overall modification and upgrade of the facility, the non-accessible and/or misaligned components will be corrected.

CONCLUSION

As discussed in this report, the results of the Washington Group design review confirmed that the design concepts reflected in the construction drawings and specifications generally conform to NIH requirements for BSL-3 laboratory facilities. The mechanical systems provide the separations and airflows required by NIH and comprise an operable system as presented. However, as also discussed in this report, a few deficiencies and shortcomings were identified that are integral to the design, and could create operating problems intermittently and/or on a seasonal basis. These deficiencies and shortcomings should be remedied to produce the year-around reliability needed for a BSL-3 laboratory with regional responsibilities. This report describes the more appropriate remedy to be implemented for each item.

Also of concern and potential impact to facility operations are the construction quality control deficiencies noted during Washington Group's inspection review of the facility. For example, caulking gaps between casework countertops and wall surfaces range from a normal $\frac{1}{4}$ " to an unacceptable $1\frac{1}{2}$ " in some areas. Caulking around several doors was observed to extend onto the adjacent wall surface and is painted over. Weld joints on the stainless steel exhaust systems reflect undercuts, cold-laps, misalignment, and other imperfections. Camera inspection of the stainless steel duct system interiors revealed similar imperfections on the inner side of the weld, plus extensive sugaring of the duct area adjacent to the weld, probably caused by failure to purge and maintain an inert environment in the weld area during weld completion. Substantial quantities of dirt and foreign materials were noted internal to the stainless steel exhaust duct systems. Many of the elastomeric seals on isolation dampers installed at the BSC's are damaged, apparently due to careless or improper installation of the adjoining ductwork. Of 14 total HEPA filters installed in the BSC's, 13 are damaged beyond the point of usability. The damage apparently occurred either during shipping or during handling and installation on site. At the minimum, they should have been replaced prior to attempting testing and balancing. Of particular concern regarding the damaged condition of these HEPA filters is the fact that they serve as the primary protection element of the entire exhaust system during tests. Had the system been started and operated with these filters in place, the entire system could have been contaminated. Also of concern, HEPA filter housings F-1 and F-2 on the roof that would serve as secondary protection for the Primary Procedures Room BSC's where critical hazardous tests are planned, are contaminated with metal shavings, dirt, and debris, apparently from weld operations performed on ductwork adjacent to the housings. Those HEPA filters are contaminated beyond usability due to the lack of protection during installation operations.

The design review and inspection also identified frequent non-compliance with specification and Code criteria that also contributed to the project's current non-usable status. For example, 36" wide stainless steel framed shower doors were specified, but 32" wide anodized aluminum units are installed. Tempering valves were specified for the sinks in Rooms 111 and 112 but are not installed. No evidence was found that seismic analyses for equipment and systems were performed as specified in section 15070, and no seismic hangers or supports were identifiable in the installation during inspection. No

isolation dampers are installed on the 5 thimble-connected BSC's, though they are specified and were highlighted as a requirement during submittal review. Fire extinguisher cabinets are not installed per specified criteria, or per NFPA recommendations. Additional non-compliances are highlighted throughout this report.

Included in Appendix A to this report is an accumulation of more than 160 photographs taken during in-depth analysis of project status on site. These photos demonstrate the construction quality deficiencies and the project's current non-usable status.

Appendix B includes a preliminary sketch for the proposed rearrangement of Shower Rooms 111 and 112 to achieve ADA conformance. Also included in Appendix B is a letter of understanding from Washington Group to the Boise City Public Works Department to document the agreement reached related to decontamination and release of waste waters from the accumulation tank located in the basement.

Appendix C contains written documentation of cost proposals received from selected vendors. They are provided in support of the data contained in the Price Schedule below.

While it is probably not economically feasible to totally remedy all of the deficiencies and shortcomings that exist in the BSL-3 Laboratory, Washington Group proposes to upgrade the facility to permit safe and unimpeded operation as mandated by NIH standards. Insofar as the mechanical systems are the dominant discipline requiring remedial services on this project, Washington Group proposes to contract with YMC Inc. to serve as the primary contractor to perform the modification and completion work. YMC Inc., in turn, has arranged with the following subcontractors to provide relevant services: AEI Enterprises to provide general contracting services; Enterprise Electric to provide electric services as needed; Total System Services to complete, calibrate, and fine tune the BAS system; and Commercial Mechanical Insulation to fulfill identified insulation needs, primarily on the outdoors located portions of the exhaust ductwork, and plumbing vent HEPA housing F-3.

All are reputable local contractors and are State of Idaho licensed to perform work on Public Works projects. To ensure independence and autonomy for their services, Washington Group will contract directly with Northwest Engineering Services, Inc. to perform the HVAC system testing and balancing, and with Toombs and Associates to perform commissioning services. Upon successful completion of required modifications, HVAC system balancing, and acceptance by the commissioning agency, Asepsis Air Control will certify the BSC's for operation.

Modification of the autoclave to permit pass-through capability between the Clinical Sample Storage Room and the Primary Procedures Room neither affects nor is dependent upon completion of the other work tasks. That pass-through capability however, is a key requirement for organized scheduling and performance of test operations in the BSL-3 Laboratory. Washington Group therefore proposes to contract directly with Johnson's Medical to implement the change simultaneous with completion of the upgrade tasks.

MANAGEMENT AND SUPPORT

Washington Group proposes to provide project management and technical and administrative support as required throughout the projects duration. Services provided will include overall management and administration of the contract, oversight of technical and construction activities, redesign of facilities as needed to achieve ADA compliance, subcontracts preparation and administration, and bi-weekly progress reporting to DPW.

Management and Support					
Description	Hours per Week	Duration	Total Hours	Rate \$	Total Cost \$
Project Manager	6 per week	30 weeks	180	120	21,600
Admin. Asst.	4 per week	30 weeks	120	45	5,400
Procurement	40 per package ¹	30 weeks	240 ¹	95	22,800
Architect	As Required ²	30 weeks ²	120 ²	95	11,400
Scientific	As Required ³	30 weeks ³	80 ³	110	8,800
Engineering	40 per week	30 weeks	1,200	110	132,000
Total			1,940		\$202,000

¹ Six subcontract packages are planned for issue by Washington Group

² Bulk of services will occur at project onset with periodic review of construction.

³ If required to support interface with AHJ.

COST SUMMARY

As indicated in the Introduction paragraph of this document, the nebulous nature of the repair work required makes development of fixed price proposals difficult. For that reason, Washington Group has encouraged its selected subcontractors to spend adequate time at the project site to become intimately familiar with existing conditions and thereby develop credible estimates to complete the required work. Though copious hours were expended to develop cost estimates however, many unknowns yet exist that cause estimators to be generally conservative in their value determinations. Washington Group therefore proposes to contract with its selected subcontractors to perform the needed services on a time and materials basis, with the monetary values reflected below a "not to exceed" value for the work scope defined in this report.

Washington Group estimates that the repair and completion services will require a period of about 7 calendar months to complete. As is normal to the construction industry, Washington Group also expects to be incrementally invoiced monthly by its subcontractors for completed work as they progress toward project completion. As reflected in the Price Schedule below, Washington Group will add 10-percent mark up to each subcontractor invoice to defray the administrative costs associated with documenting and paying those invoices.

Price Schedule					
Item	Man-hours	Rate	Subtotal	Multiplier	Total \$
YMC Inc.	7,002	82.00	1,189,023 ^a	1.10	1,307,925
Allied General	N/A	72.00	17,221 ^b	1.10	18,943
Northwest Engineering	N/A	95.00	14,125 ^c	1.10	15,537
Toombs & Associates	N/A	N/A	12,600 ^c	1.10	13,860
Johnson's Medical	N/A	N/A	2,750 ^c	1.10	3,025
Asepsis Air Control	N/A	N/A	1,680 ^c	1.10	1,848
Washington Group Int'l	1,940	Varies	202,000	N/A	202,000
TOTAL			1,439,399		\$1,563,138

^a Includes Required Materials, Subcontractors, and Labor

^b Includes Required Materials and Labor

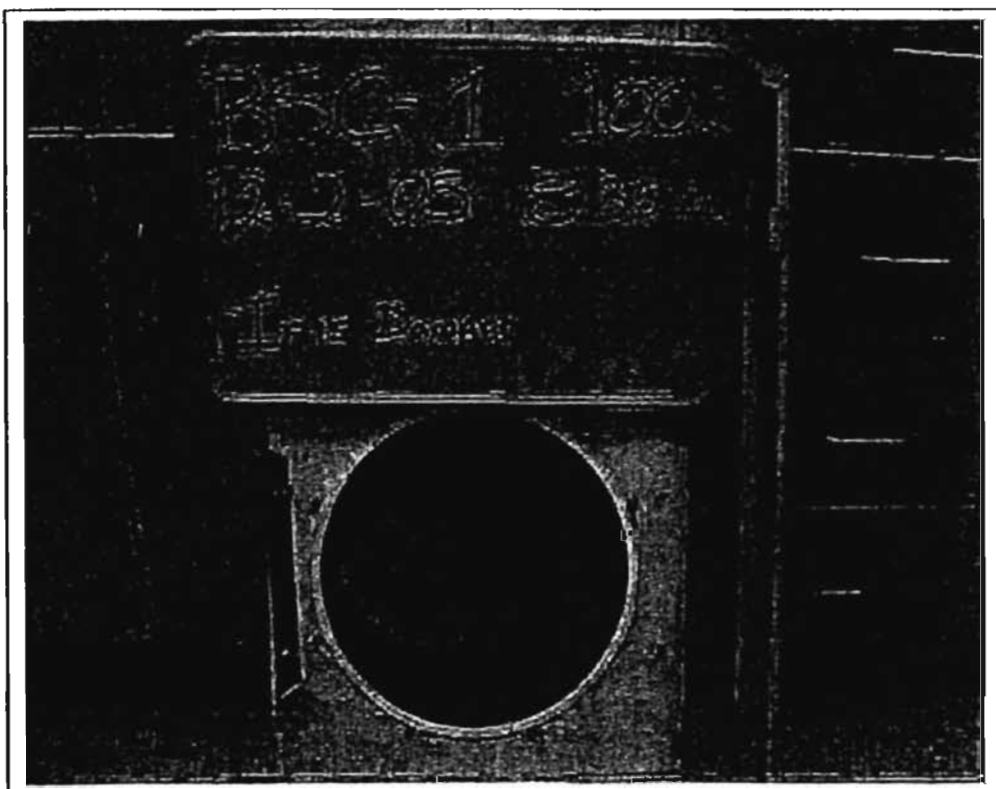
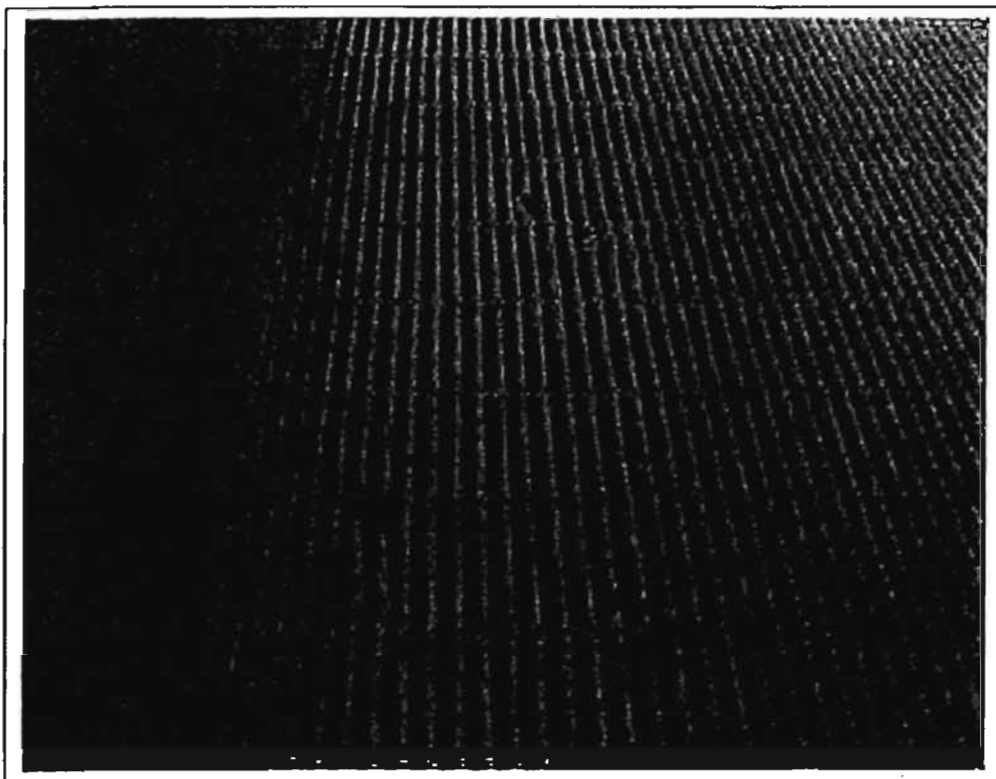
^c Includes Professional Services, and Travel and Lodging Expenses

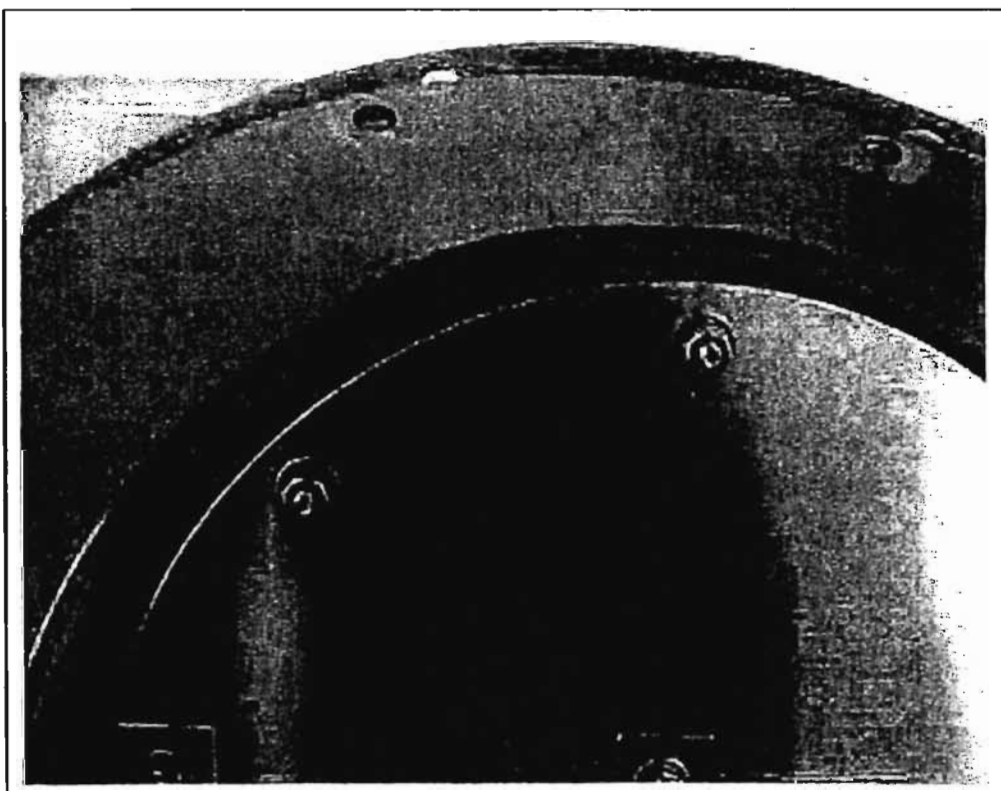
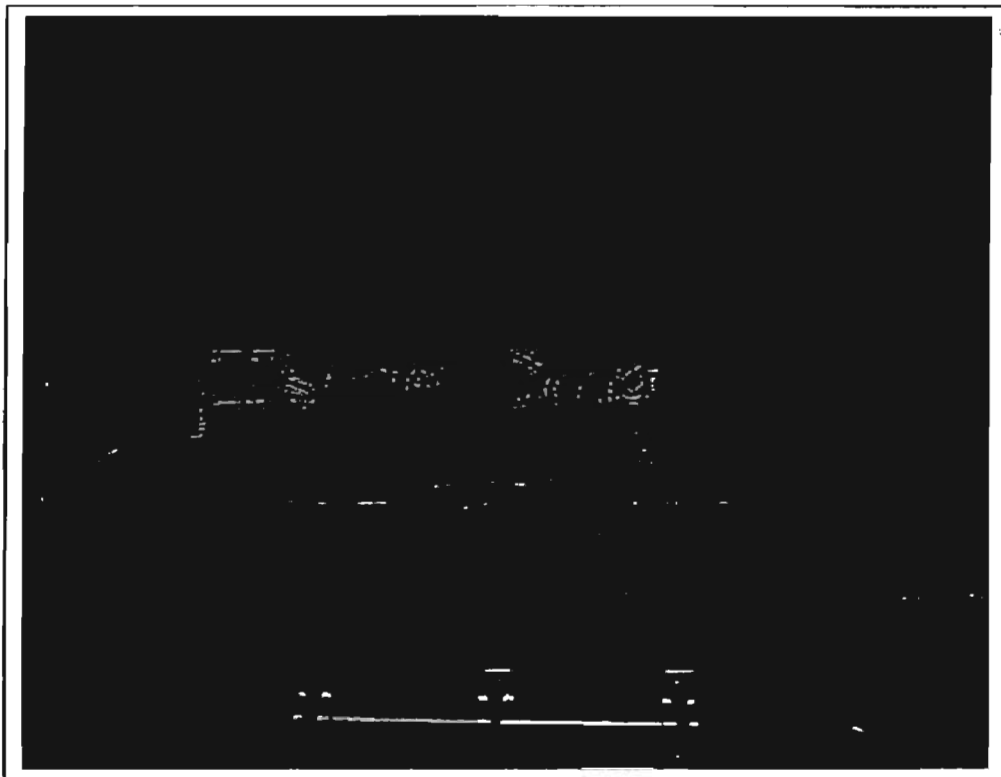
APPENDIX - A

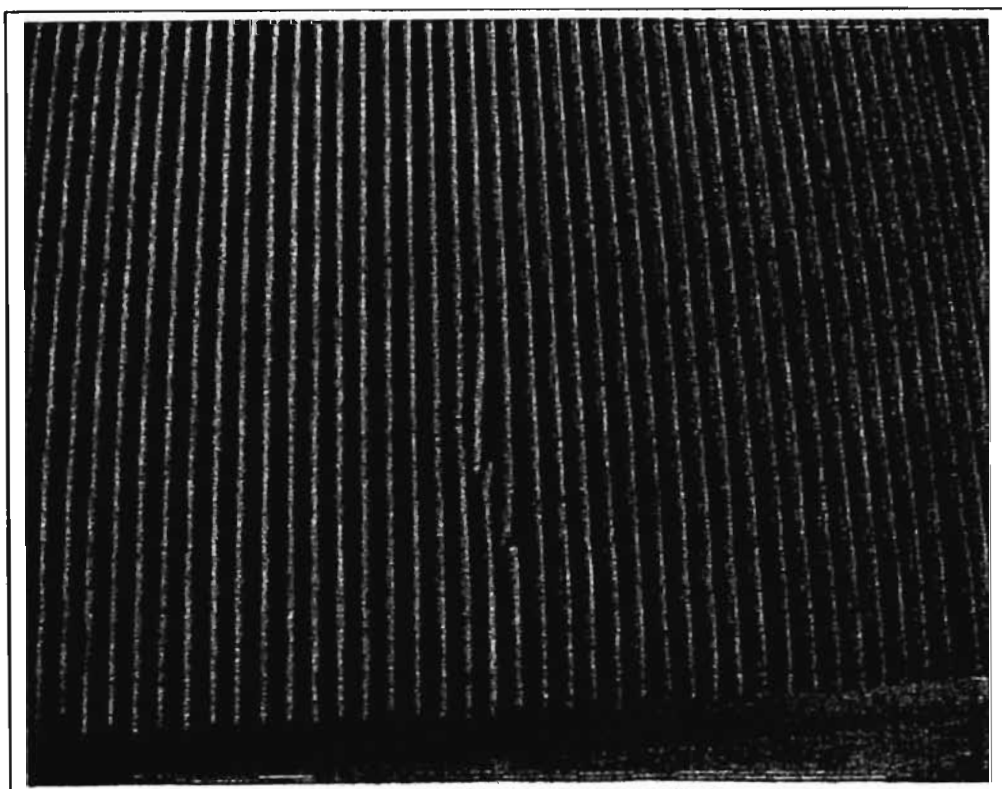
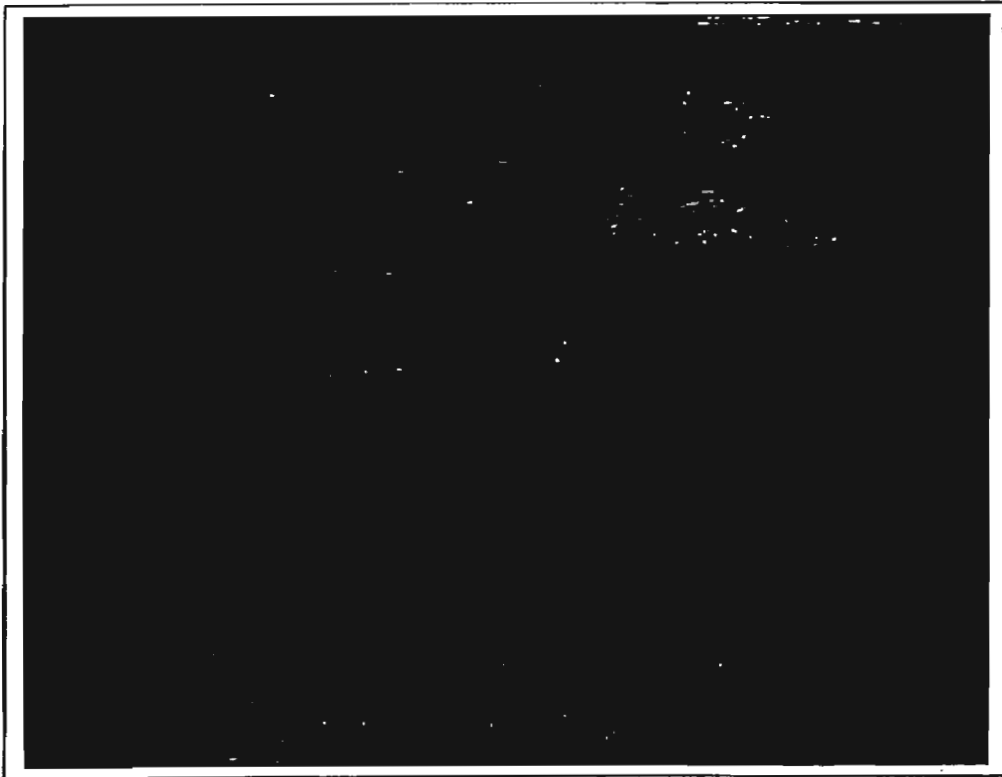
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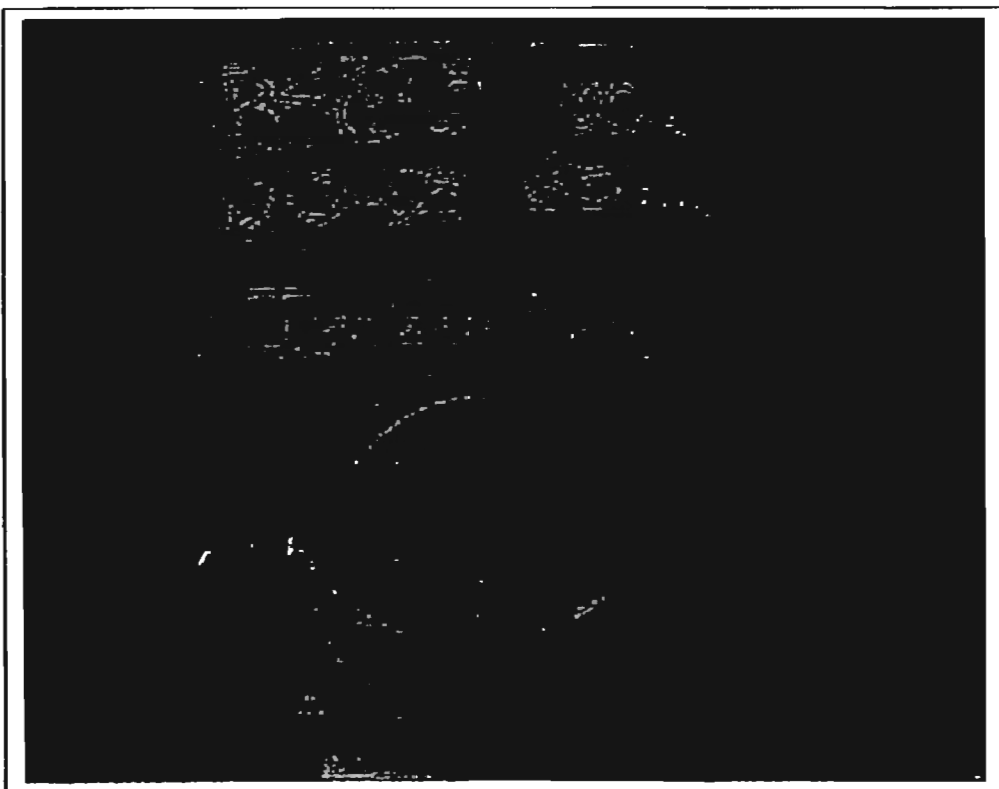
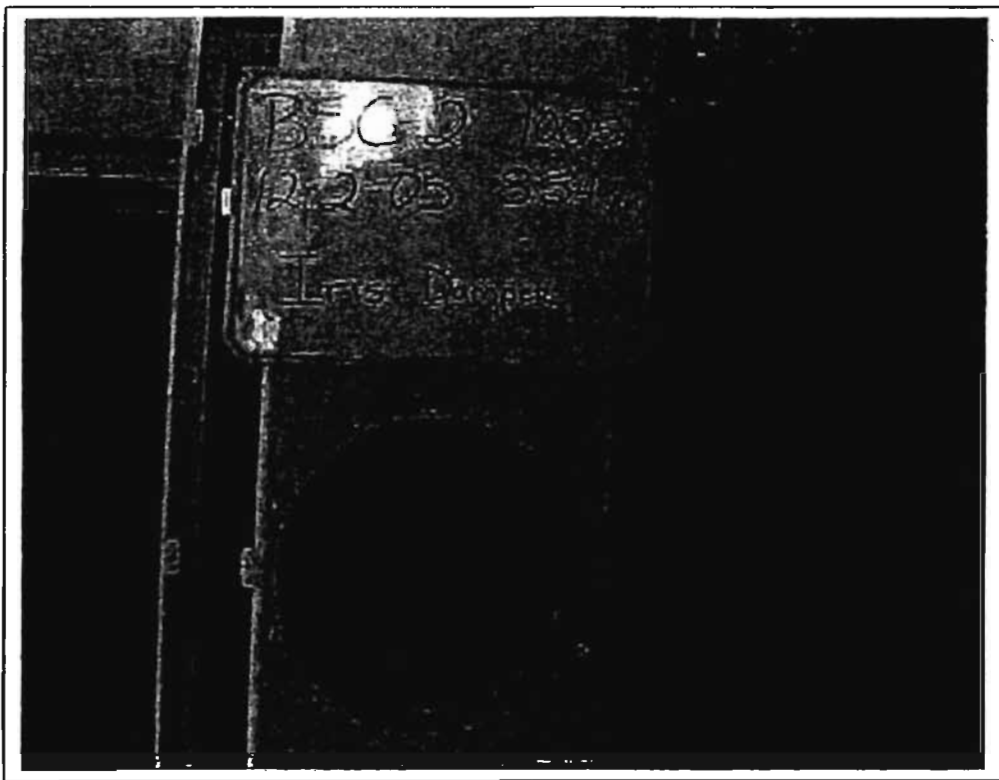
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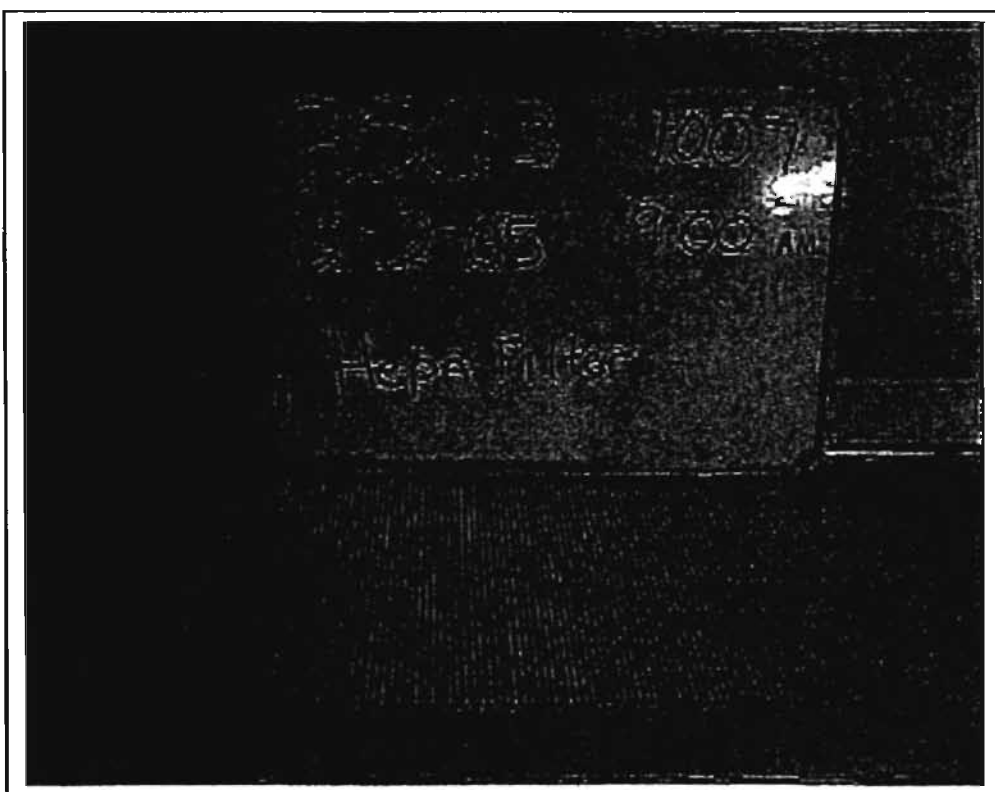
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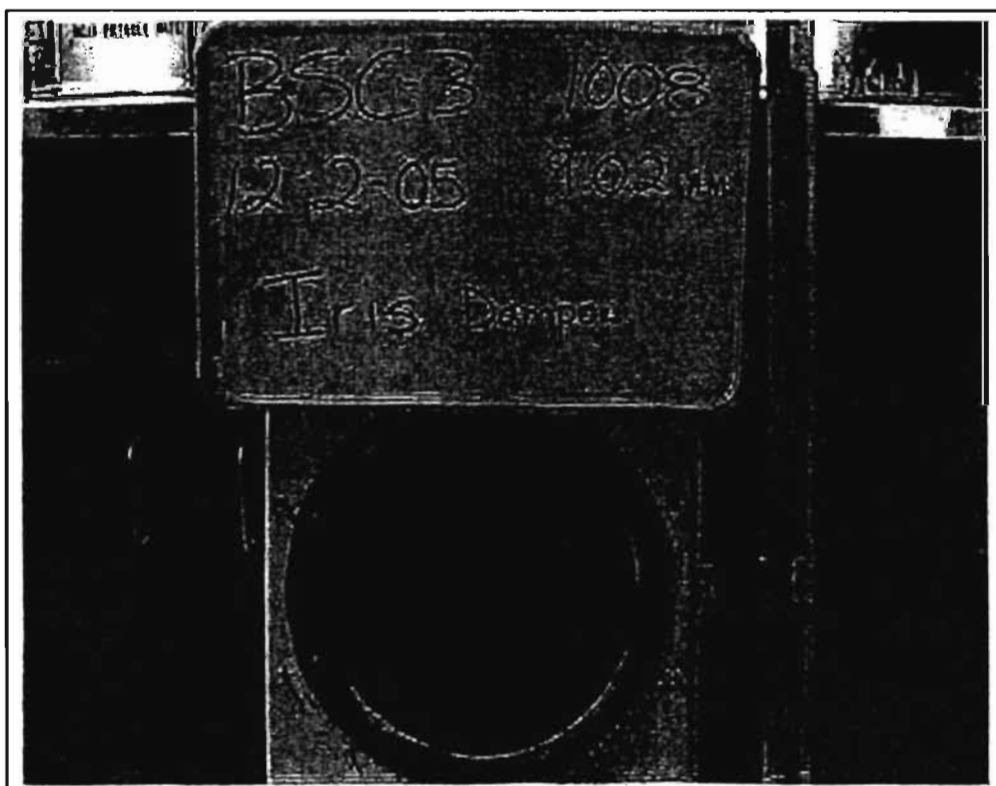
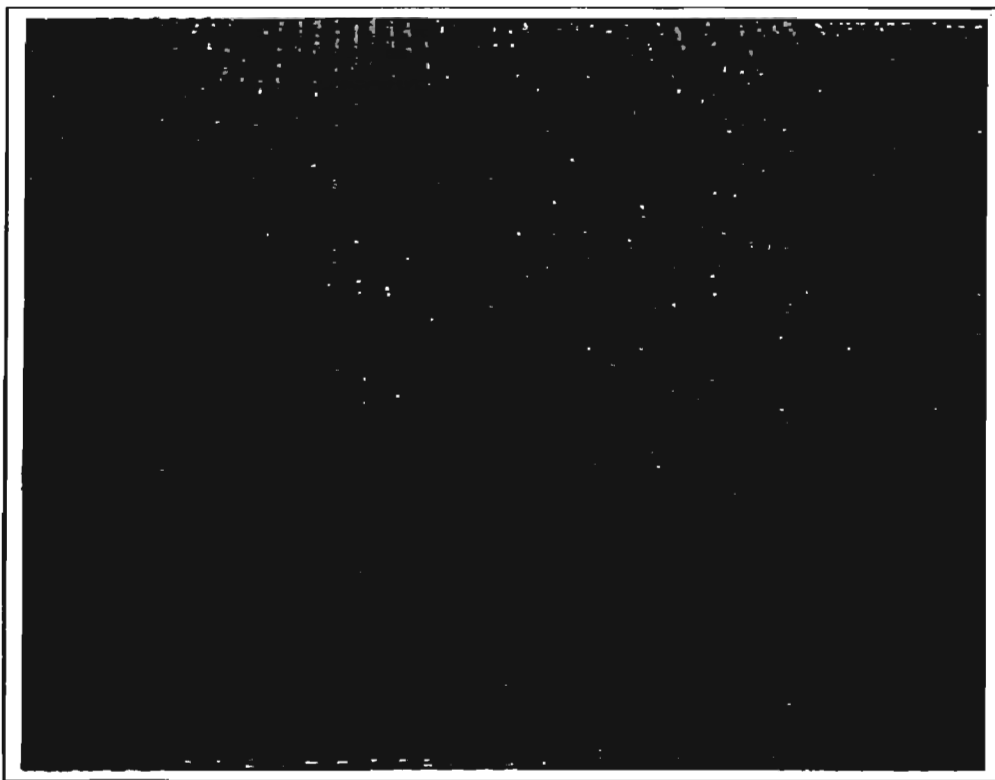


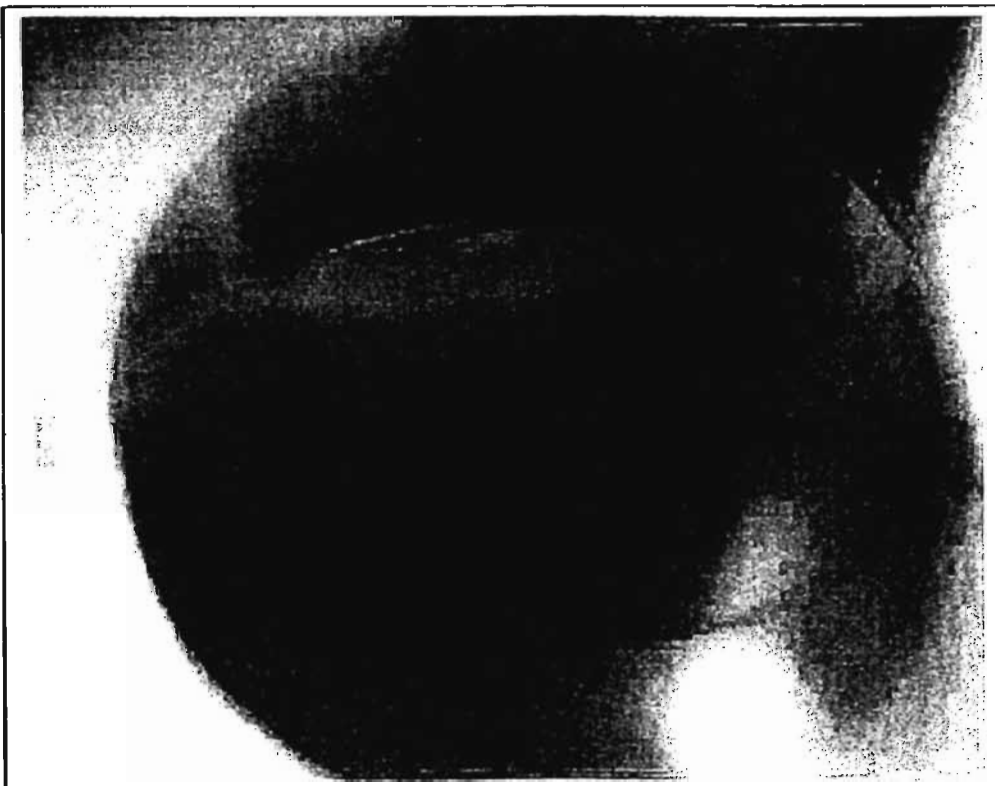


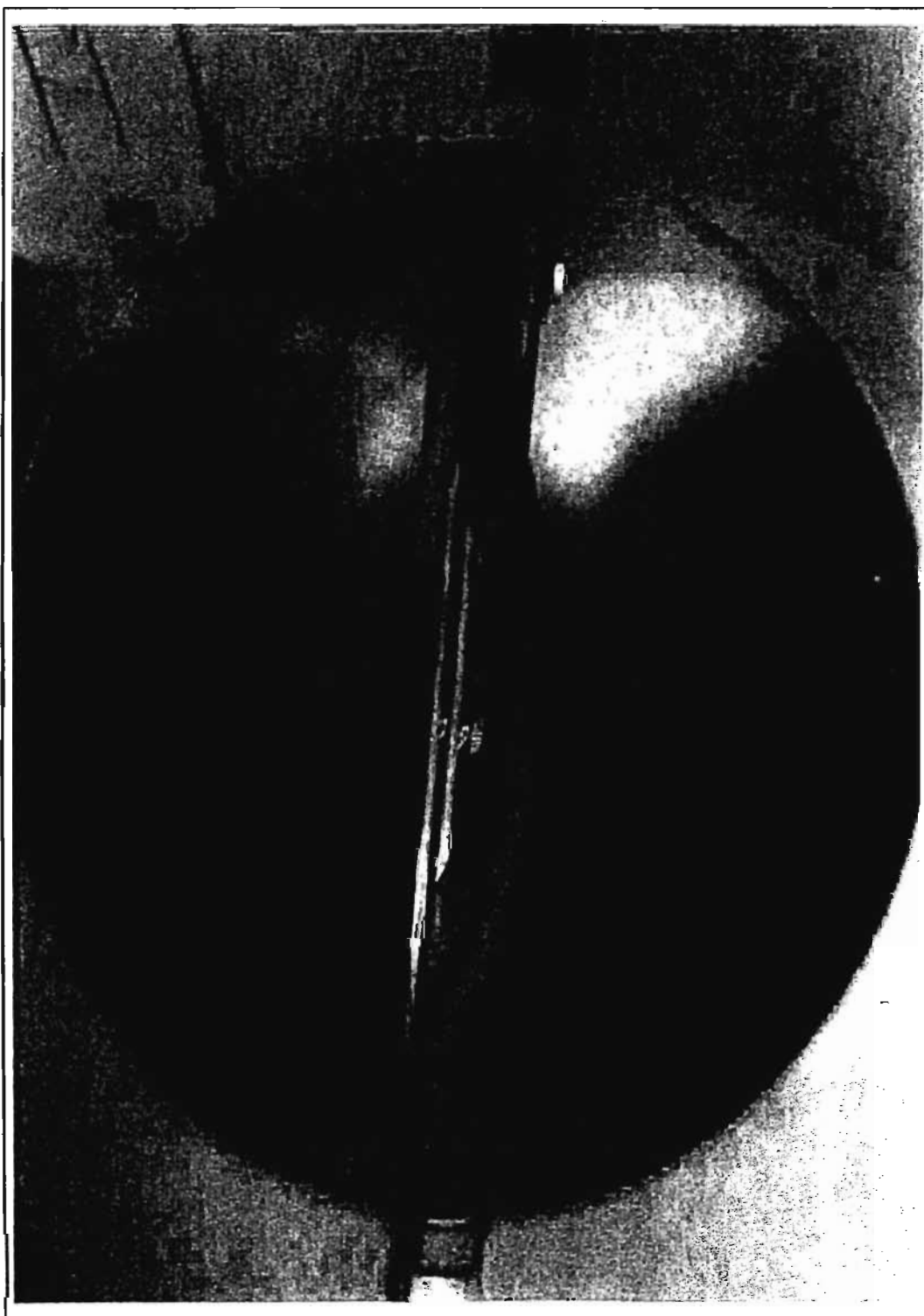




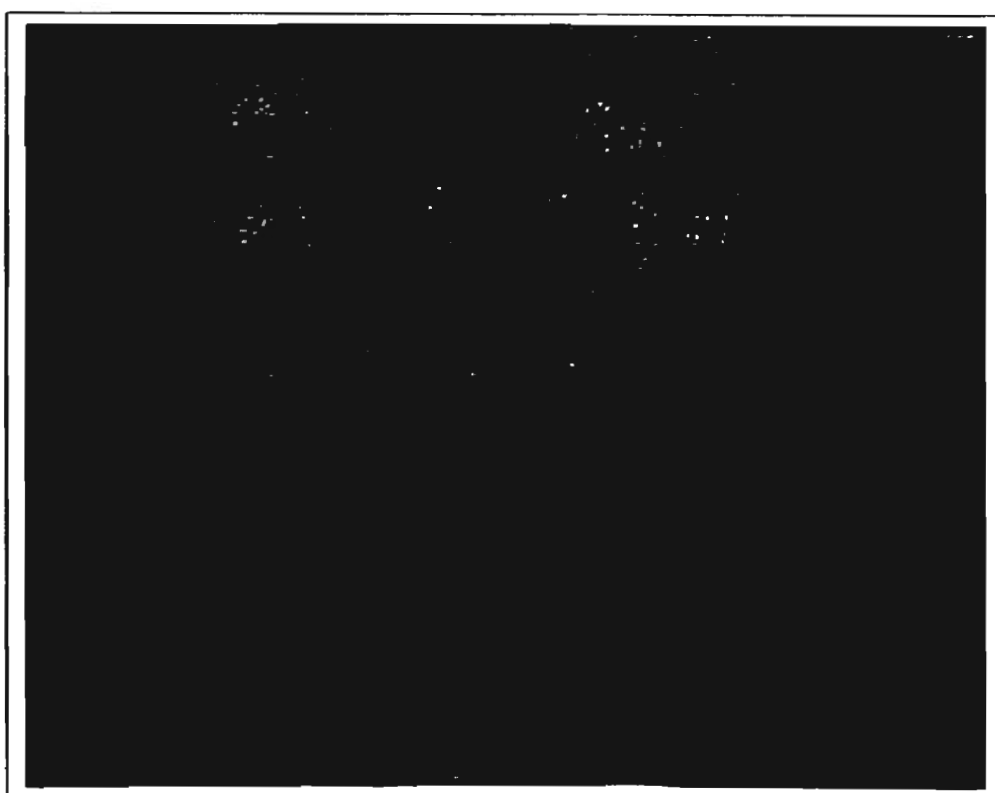
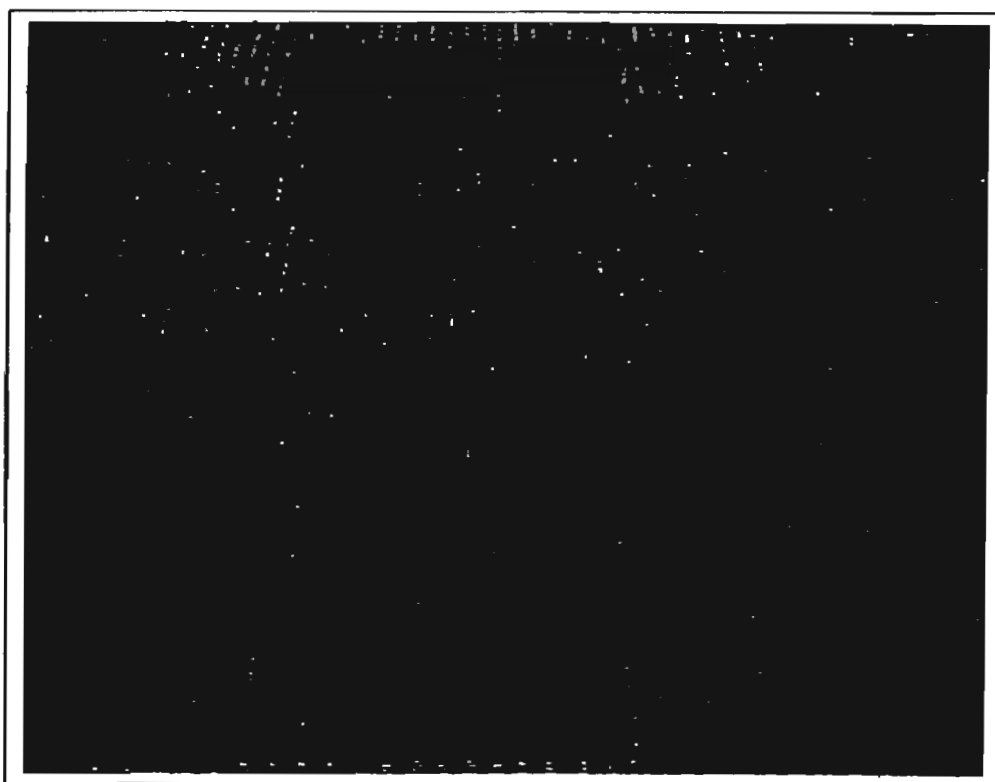


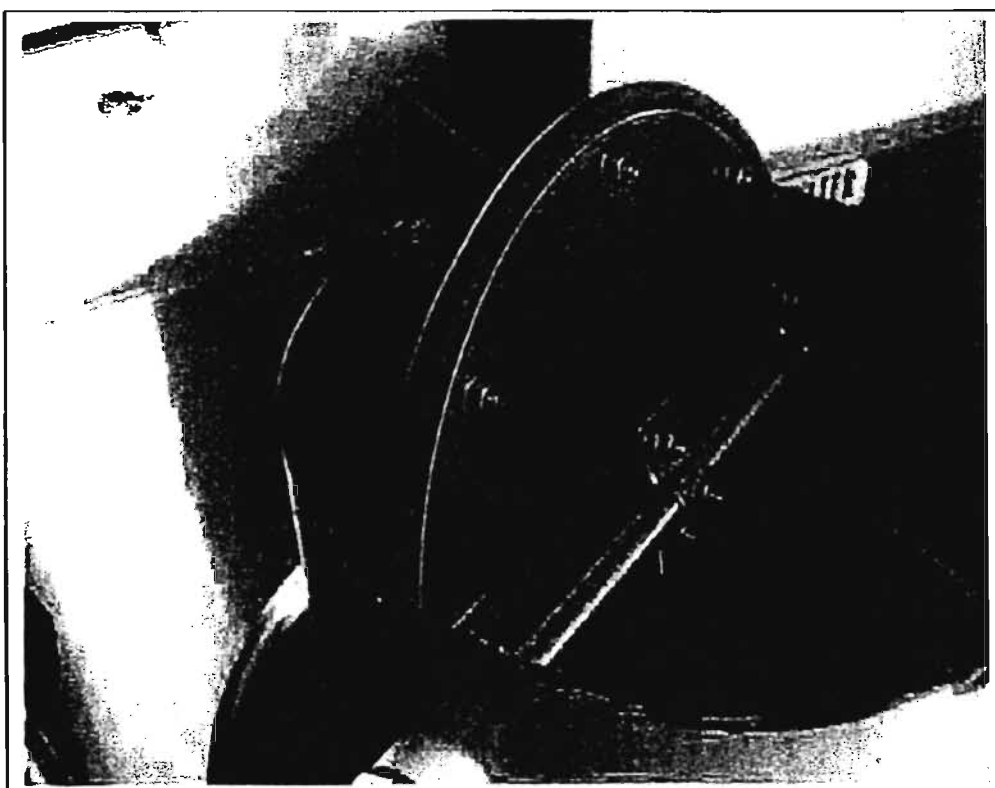
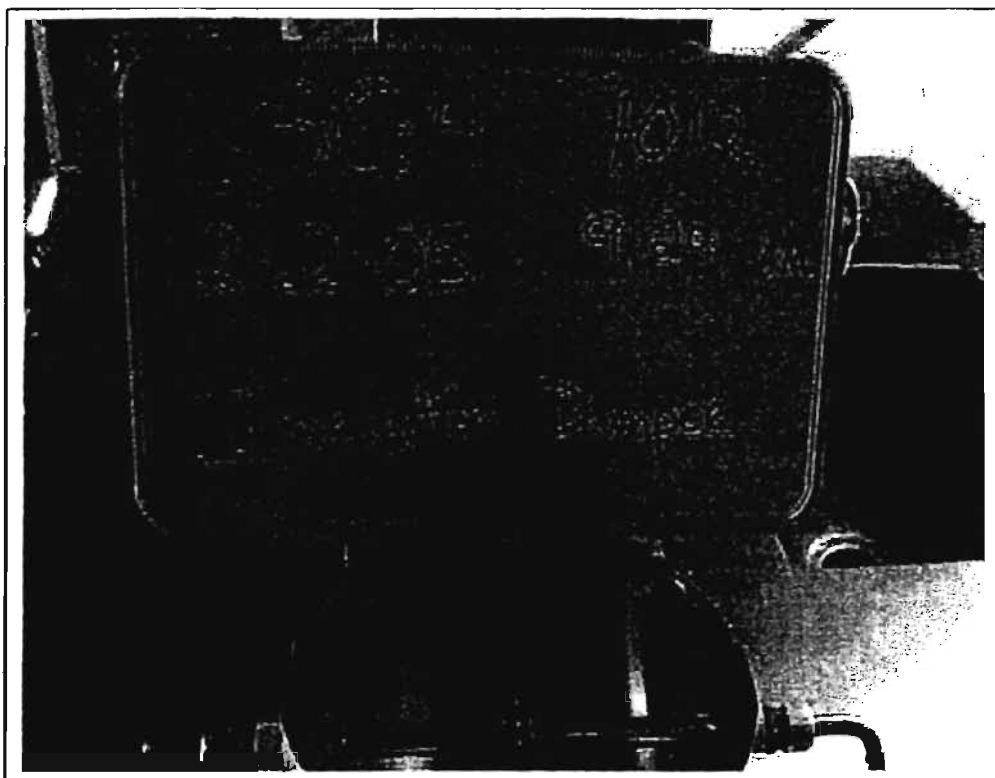




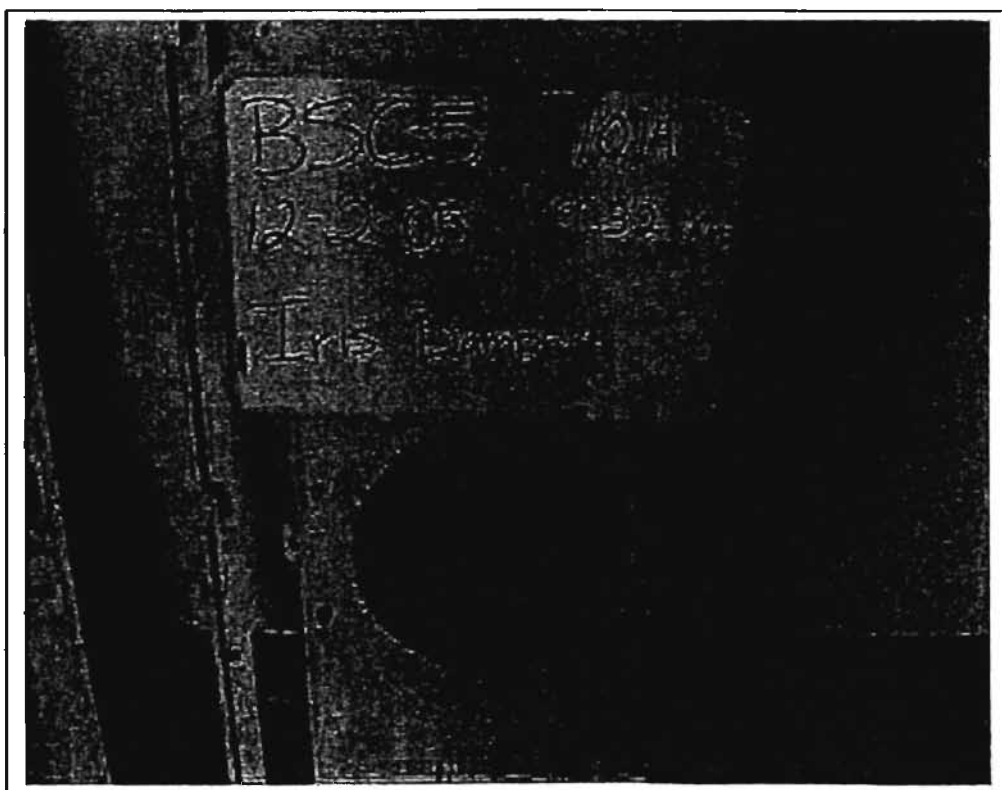
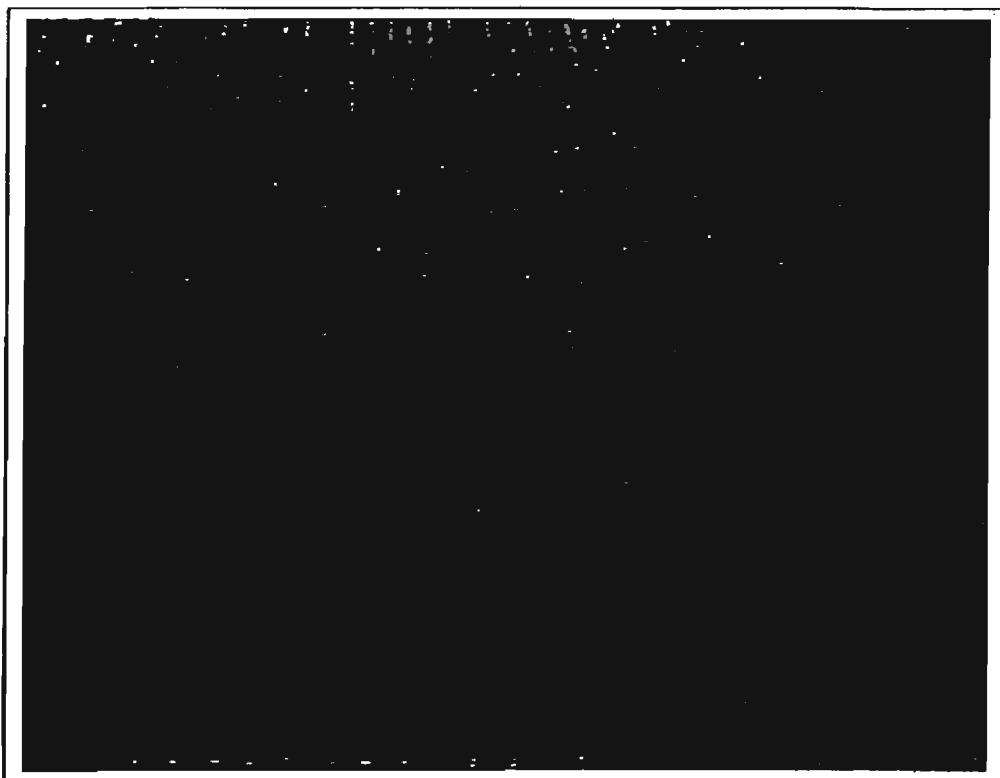


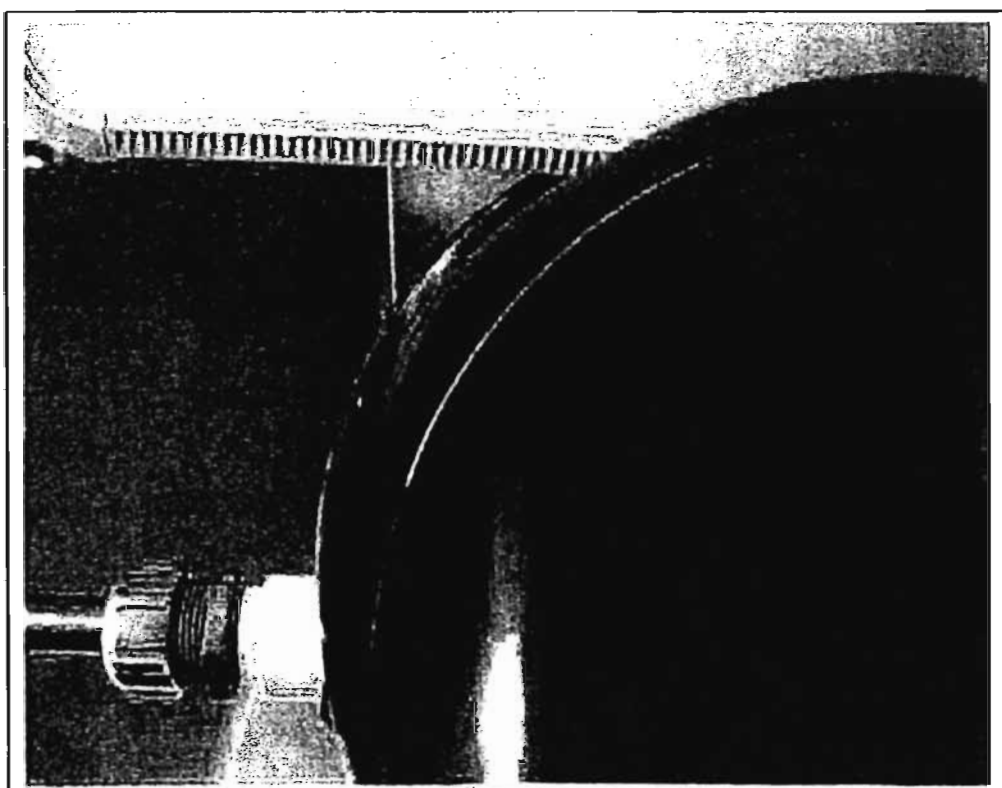
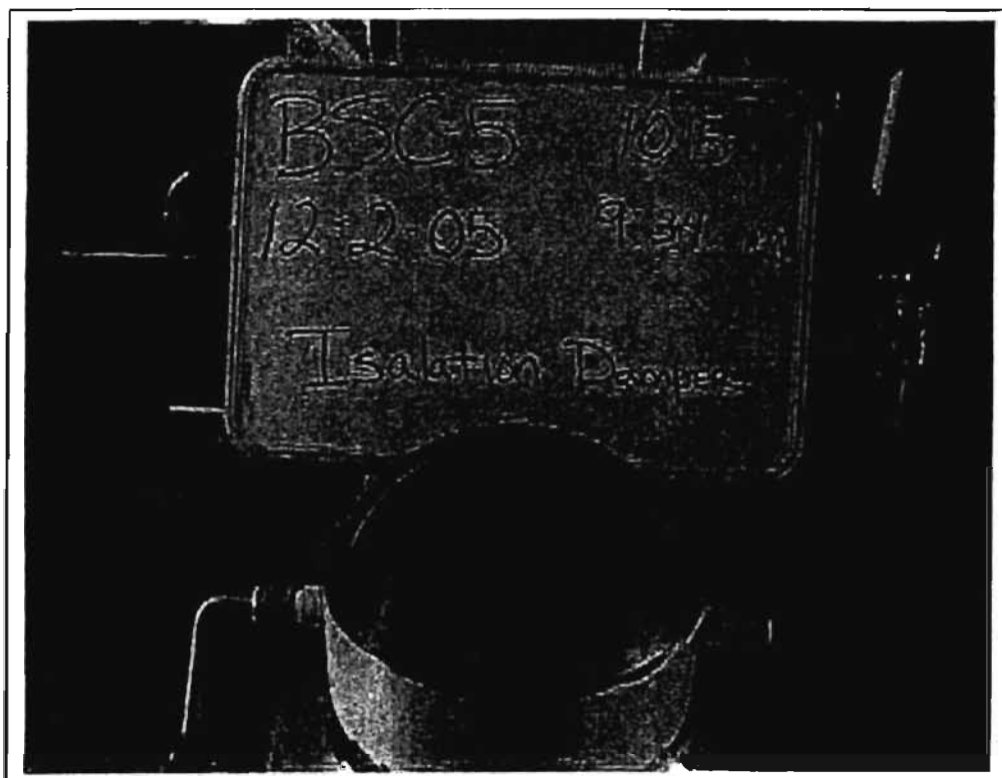


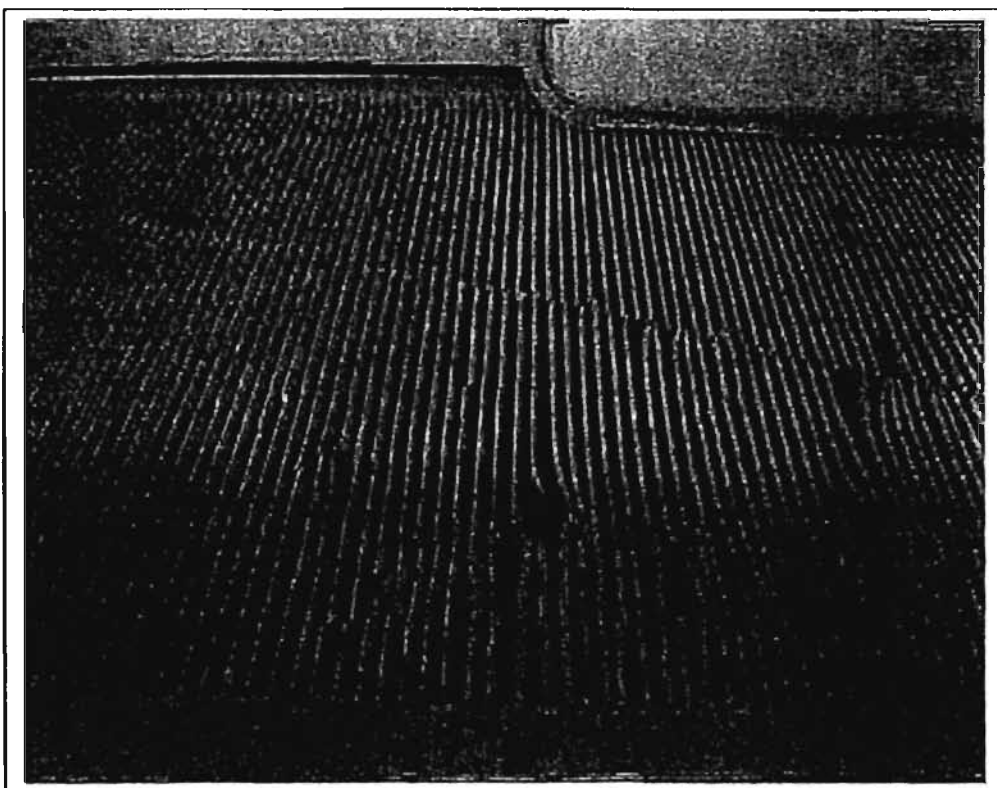
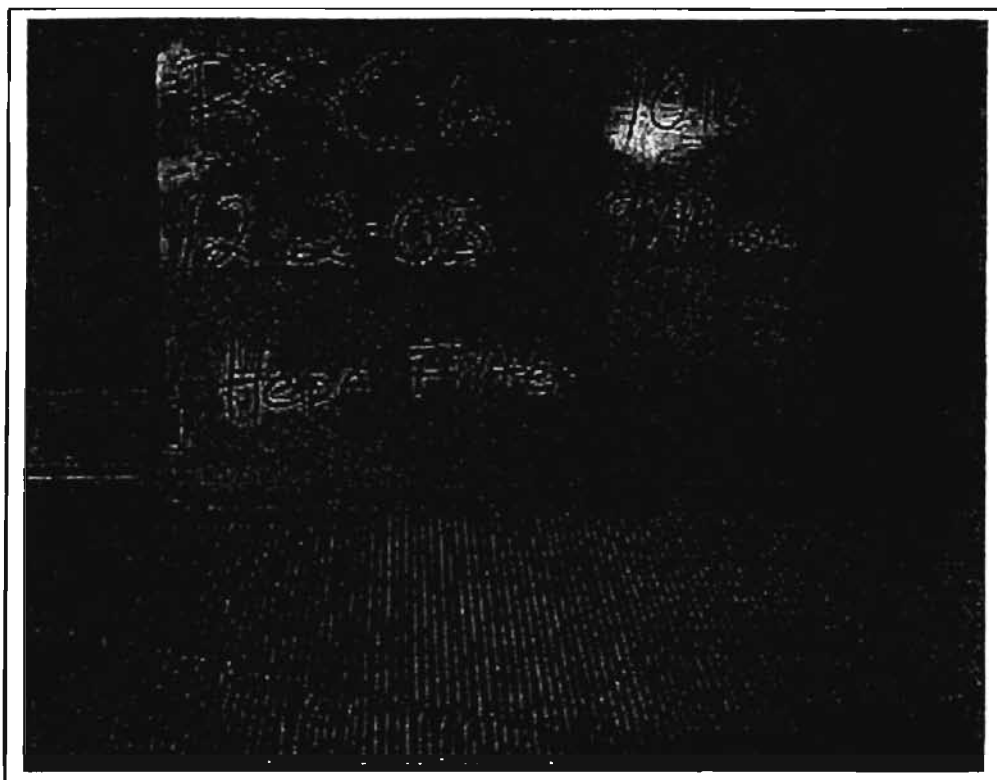


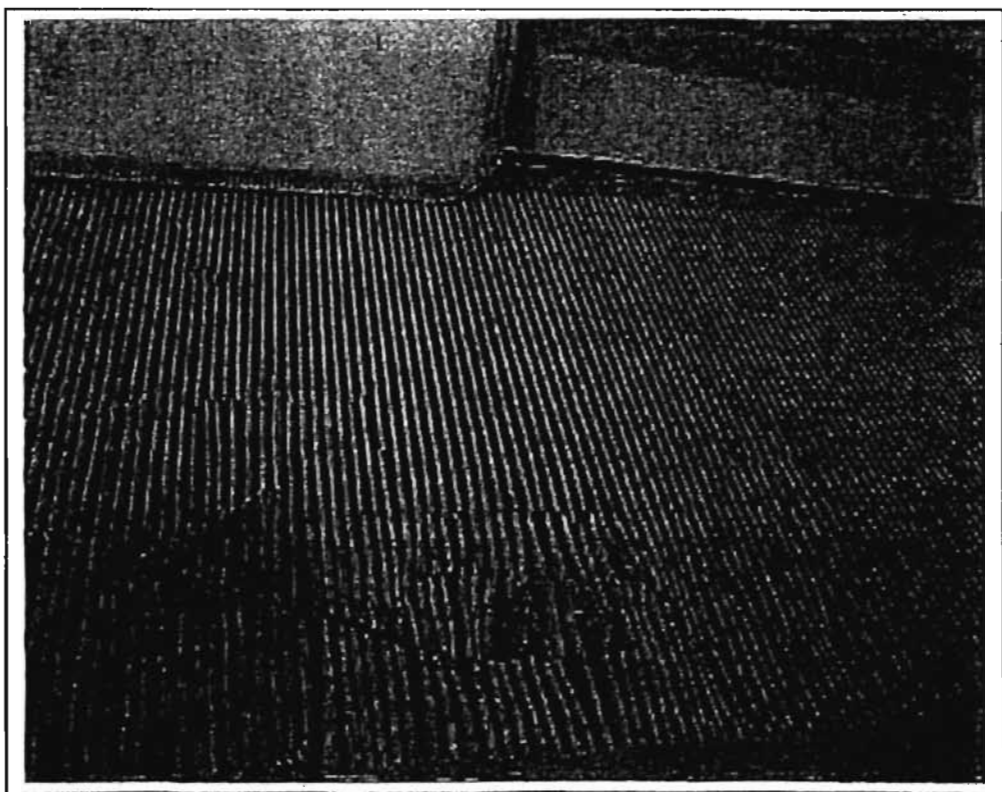
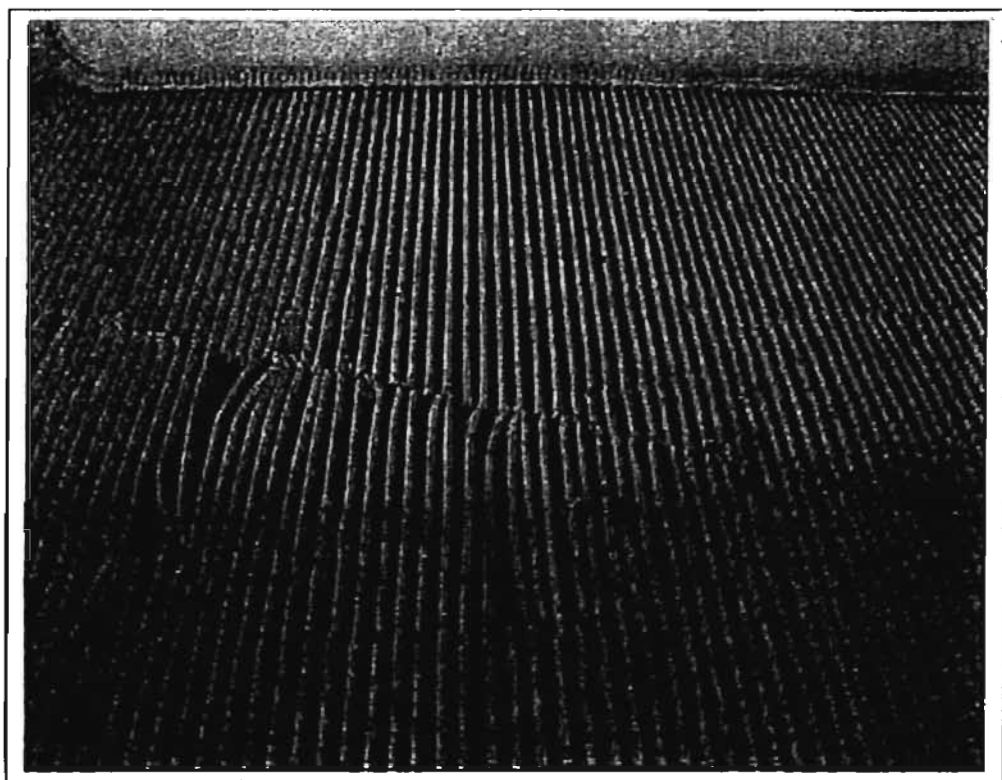


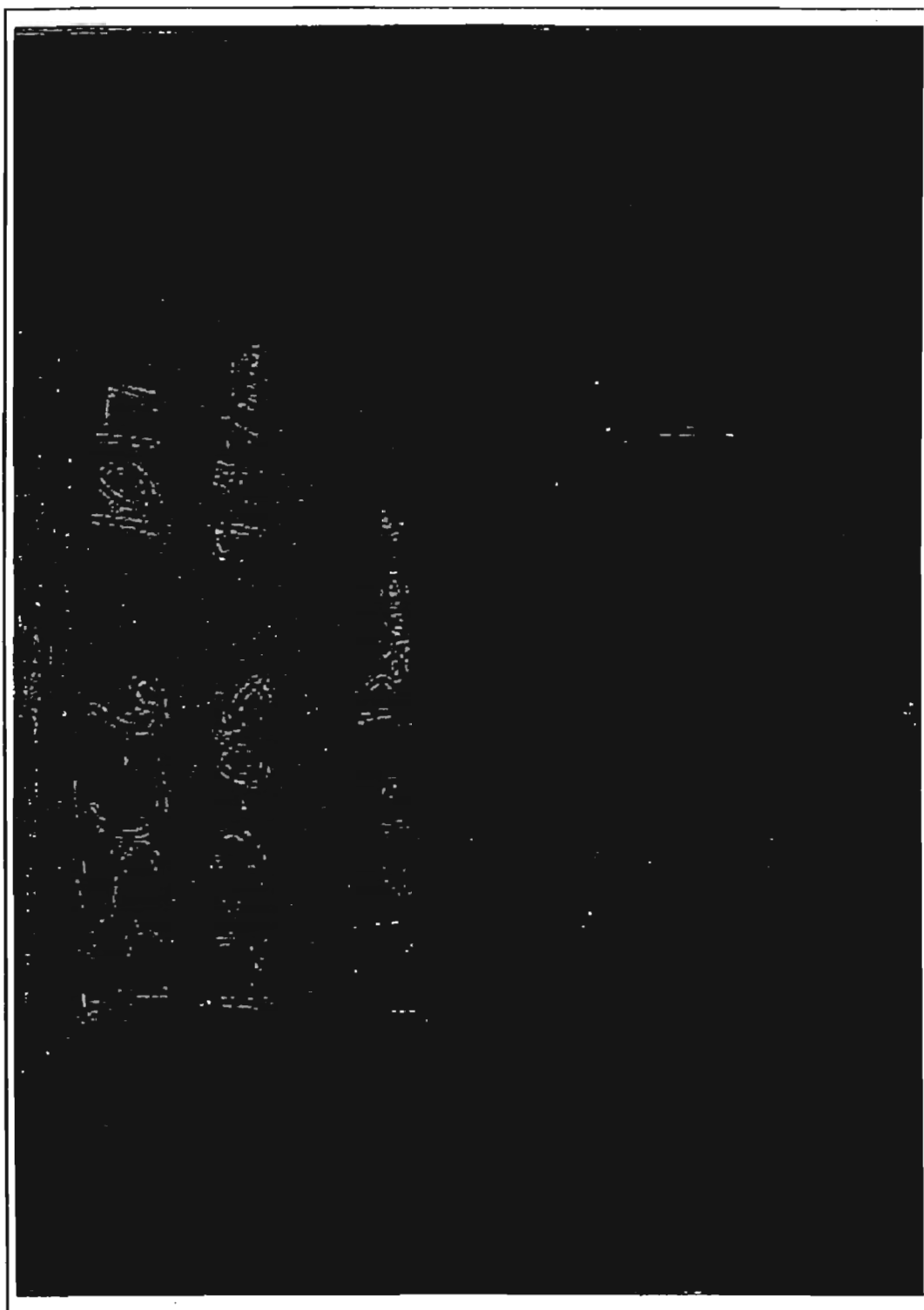


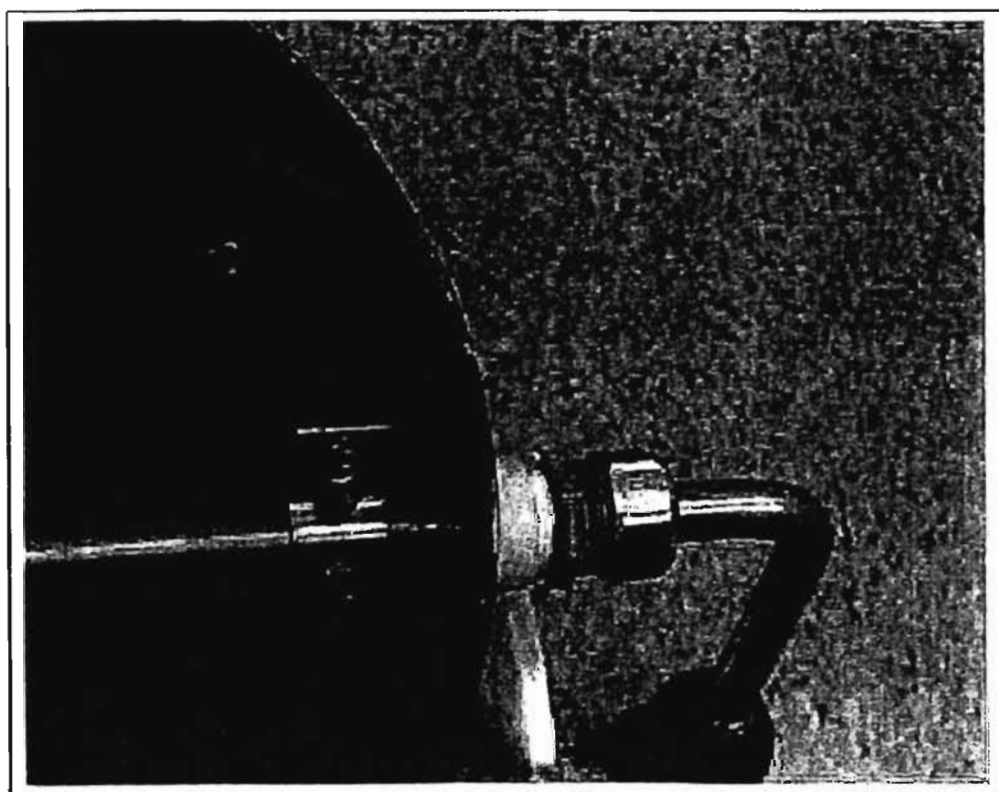
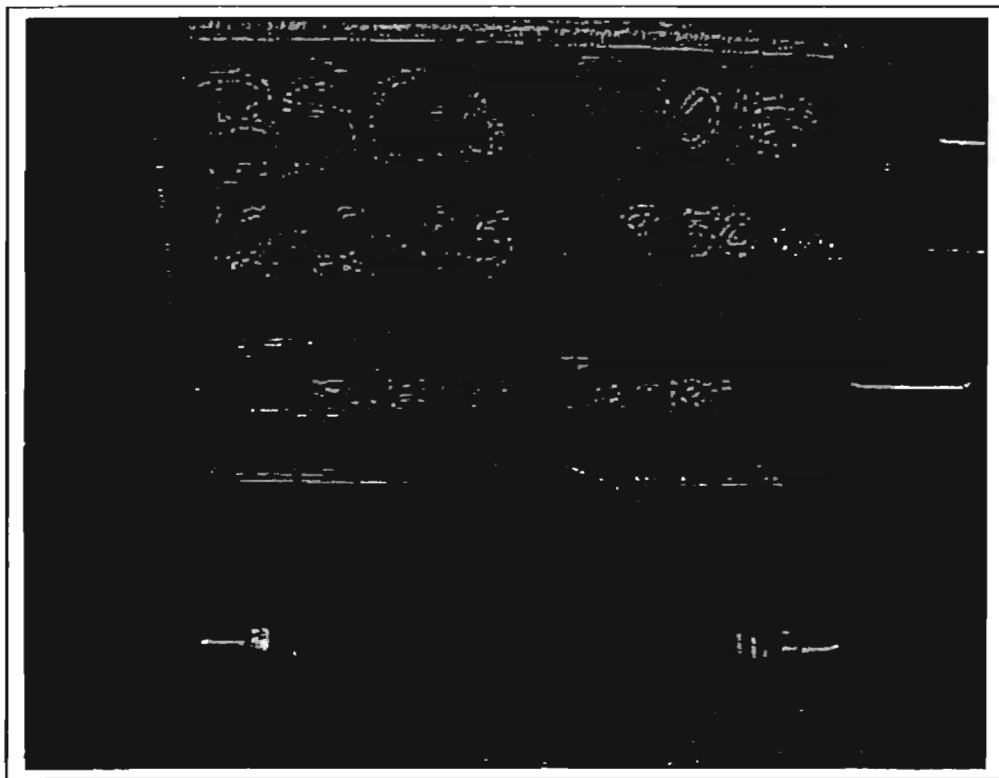


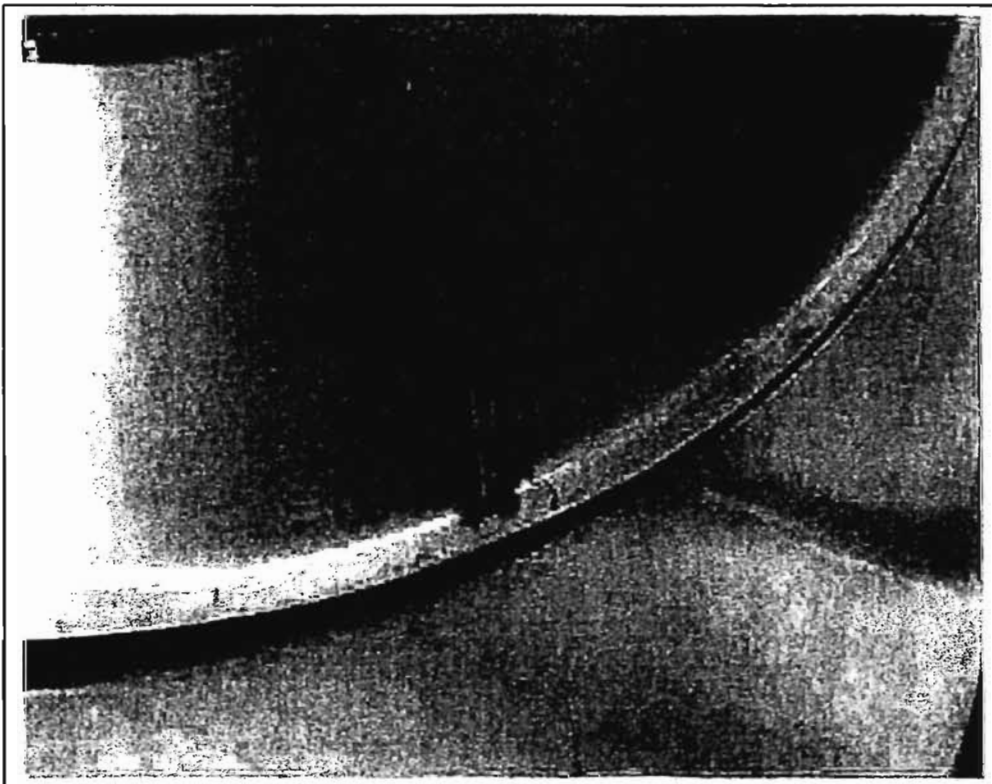
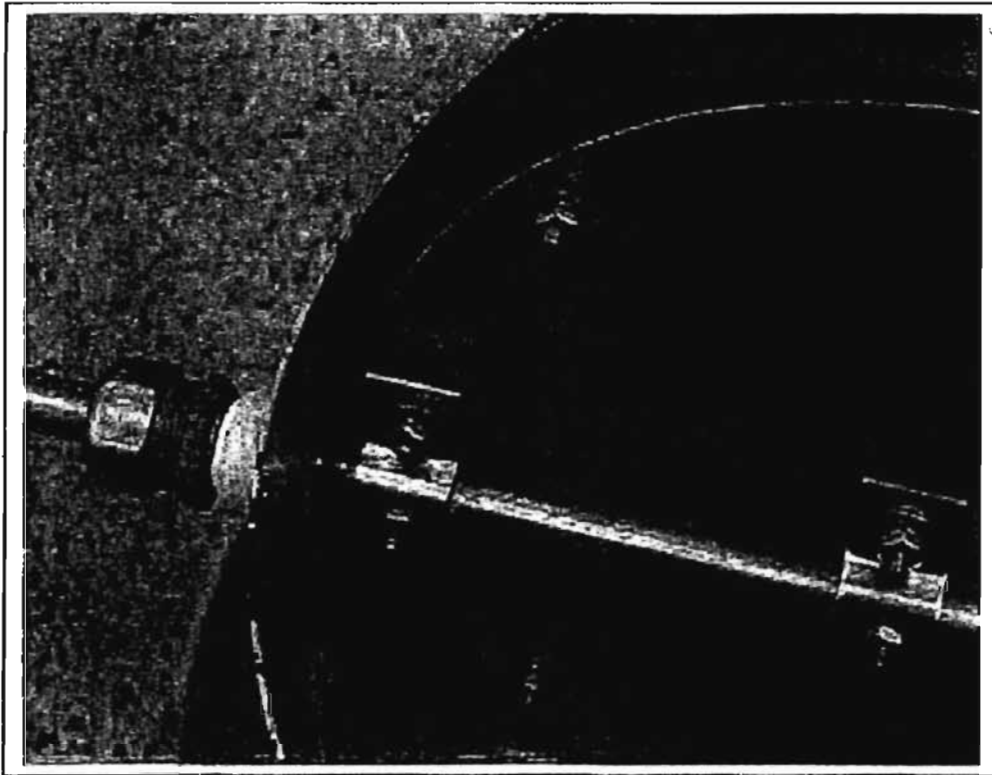


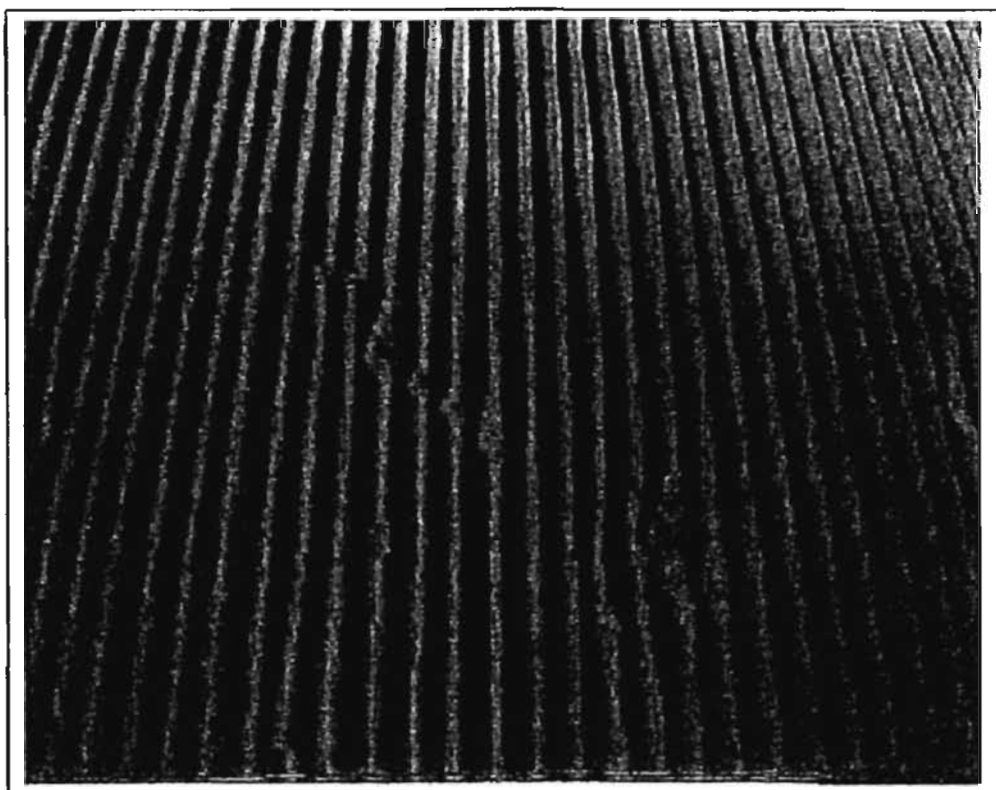


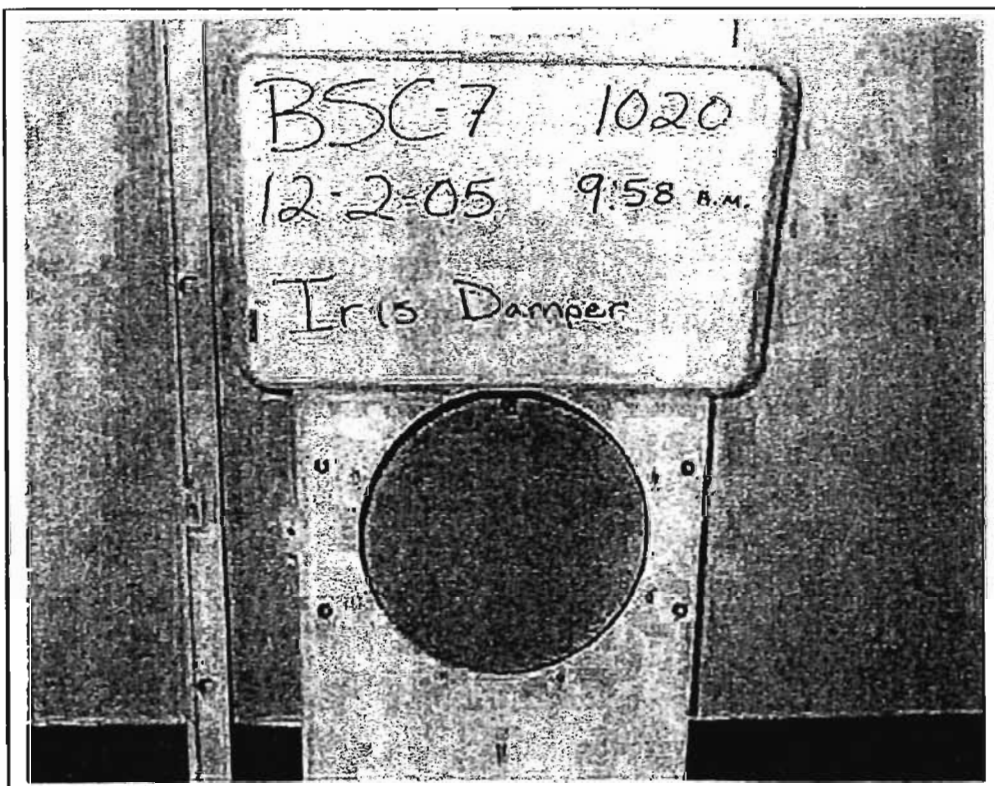
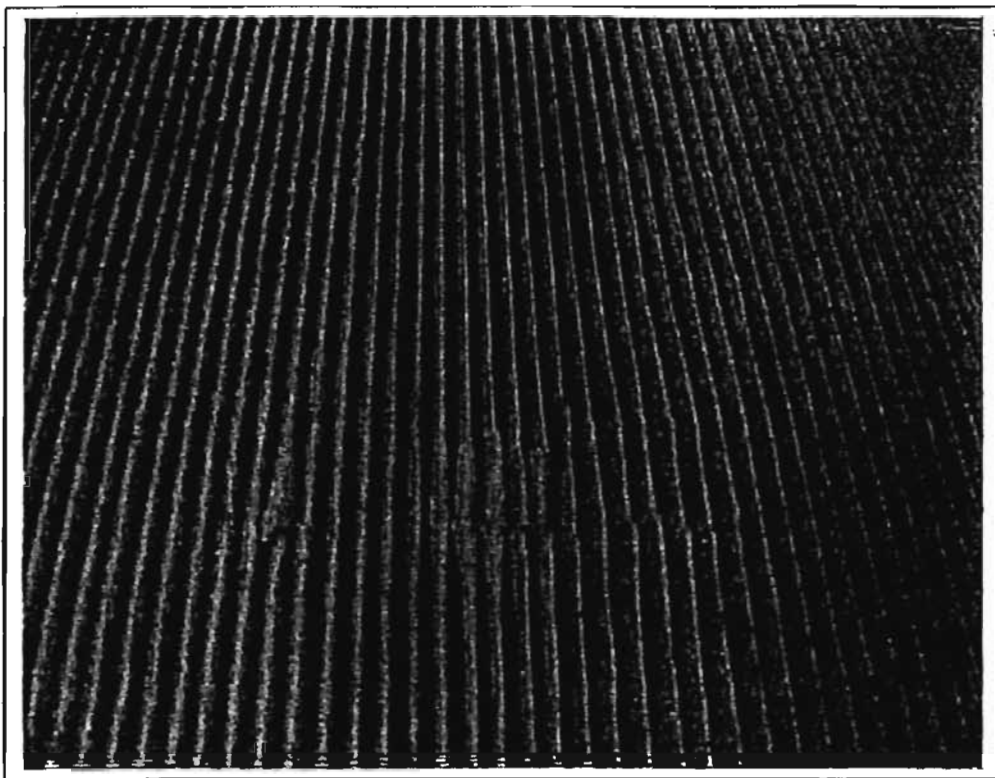


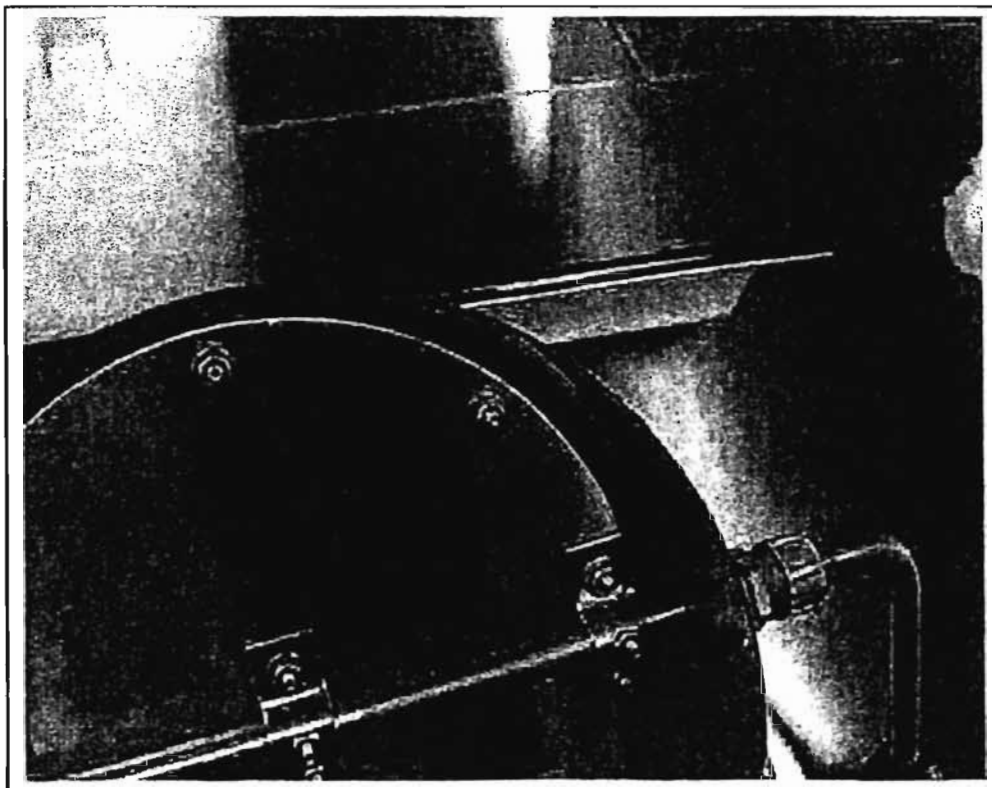
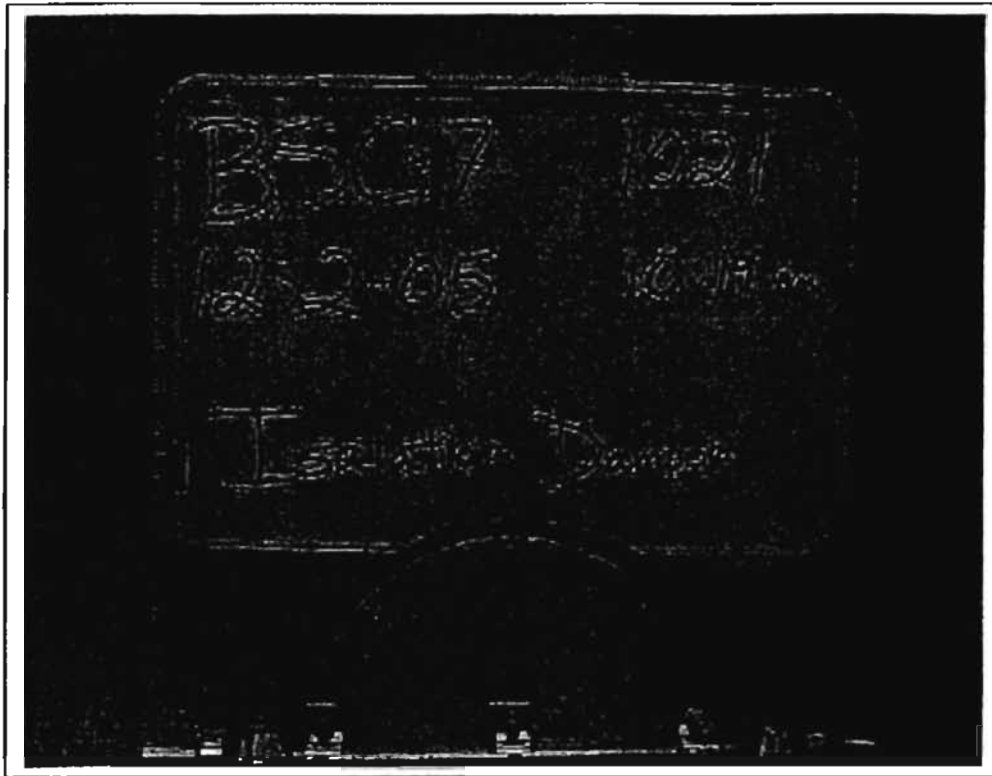


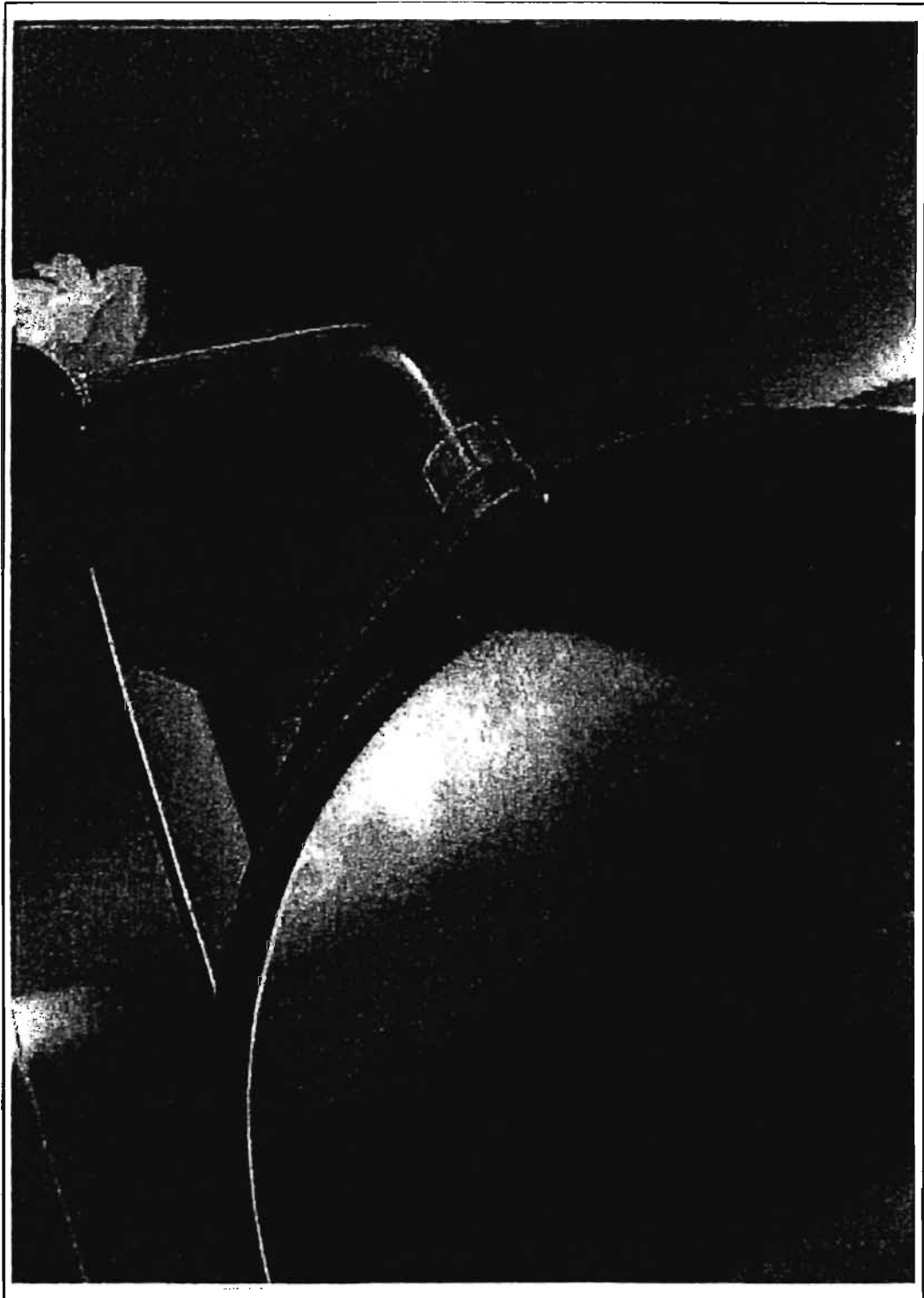


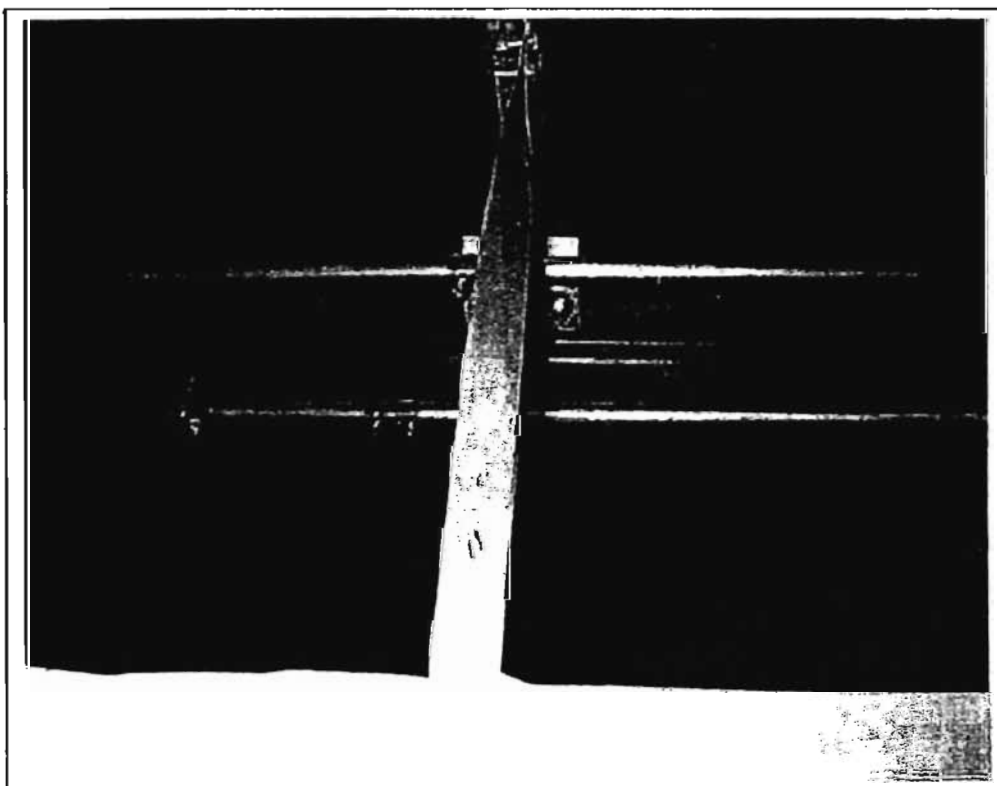
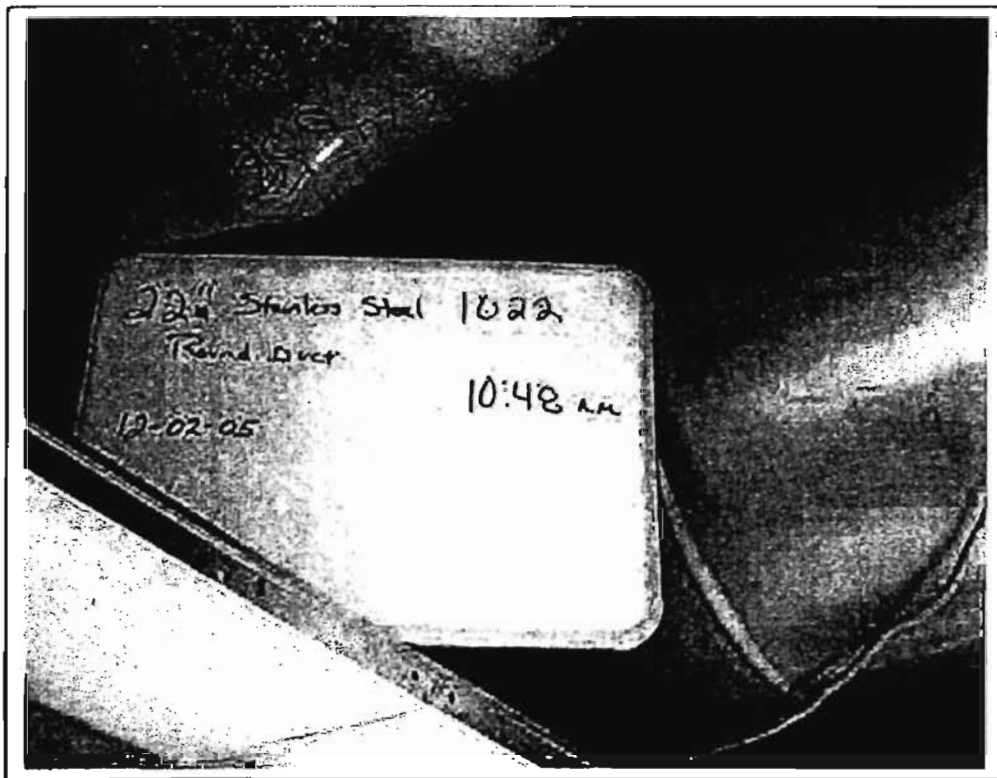








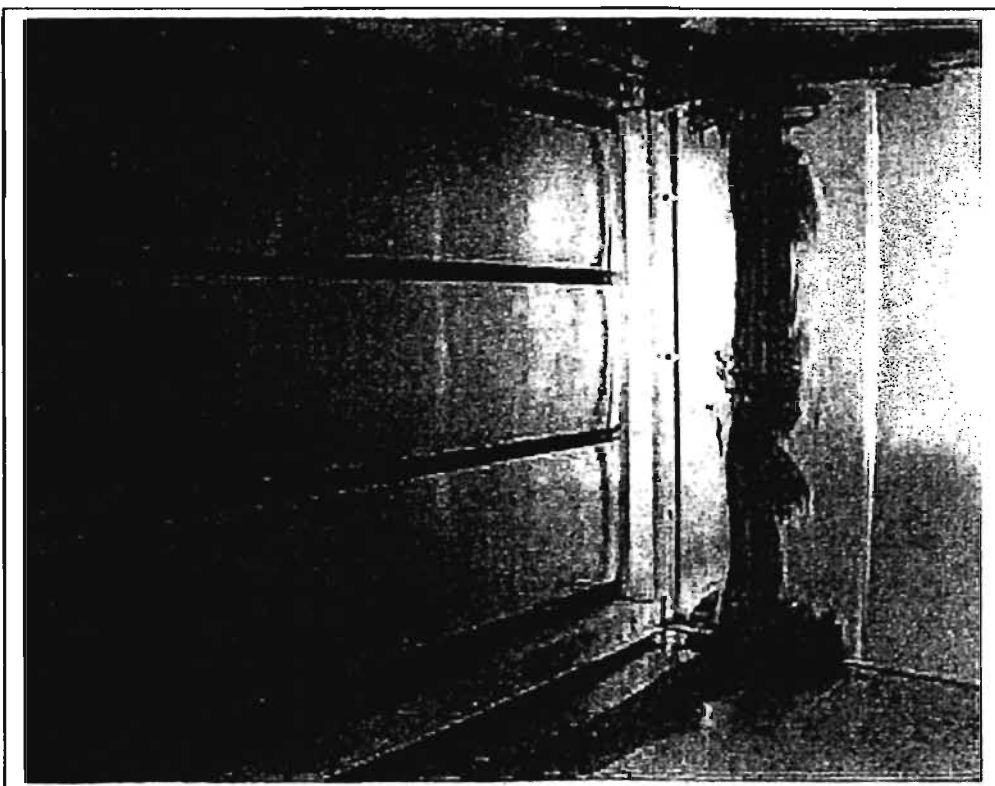
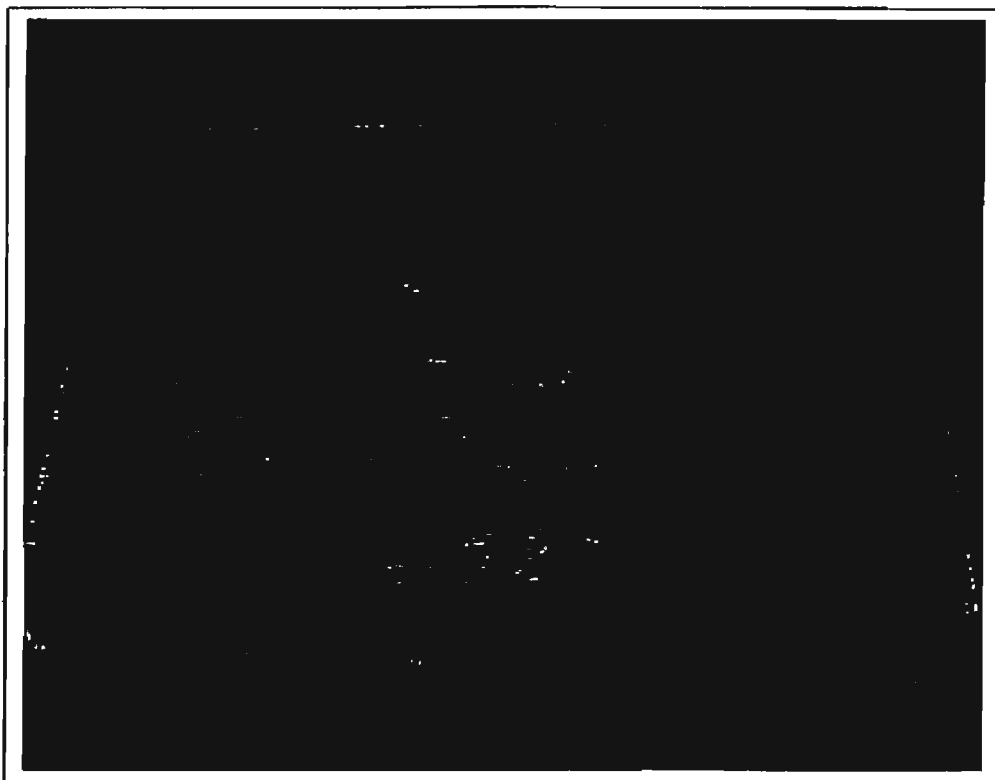


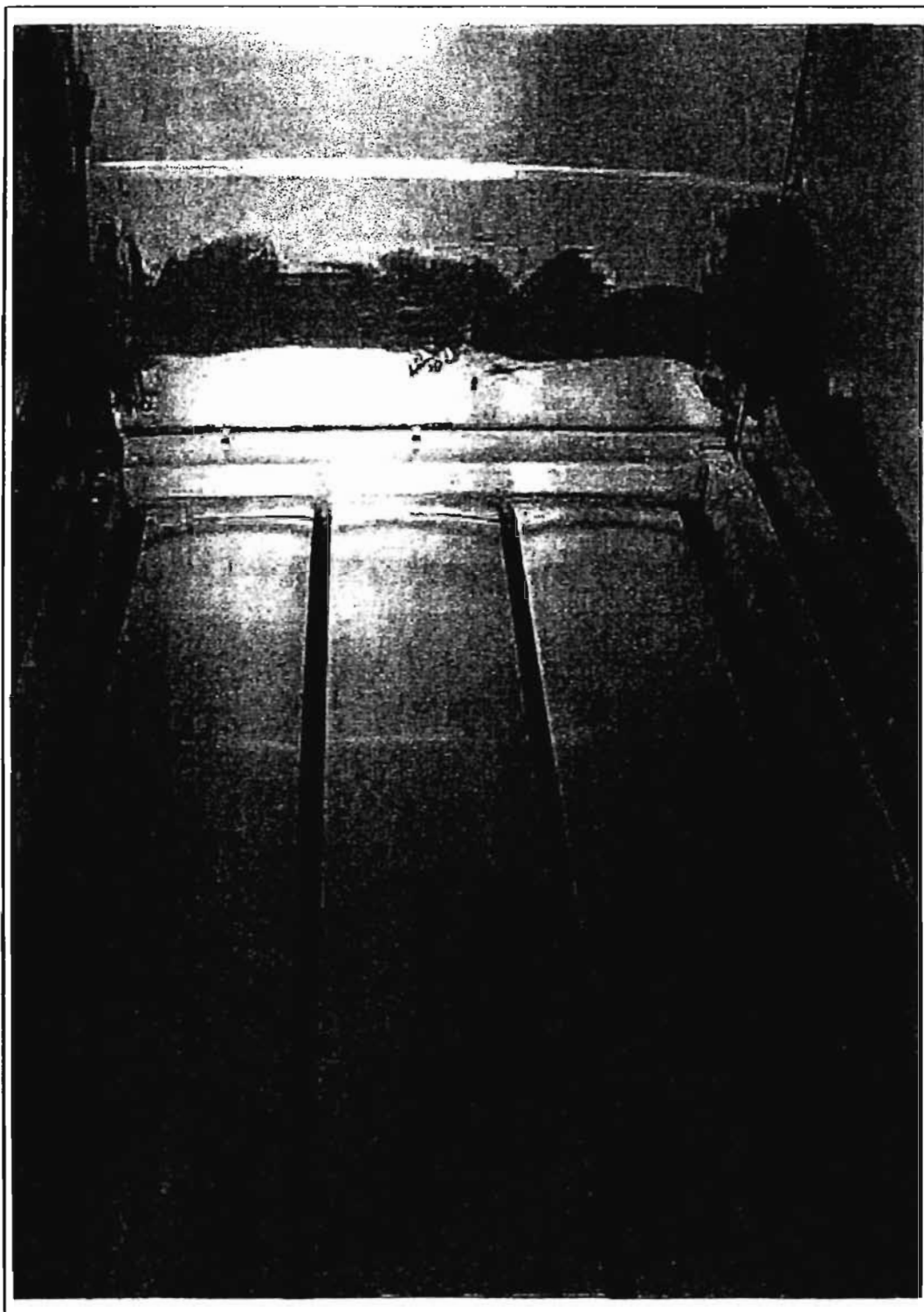




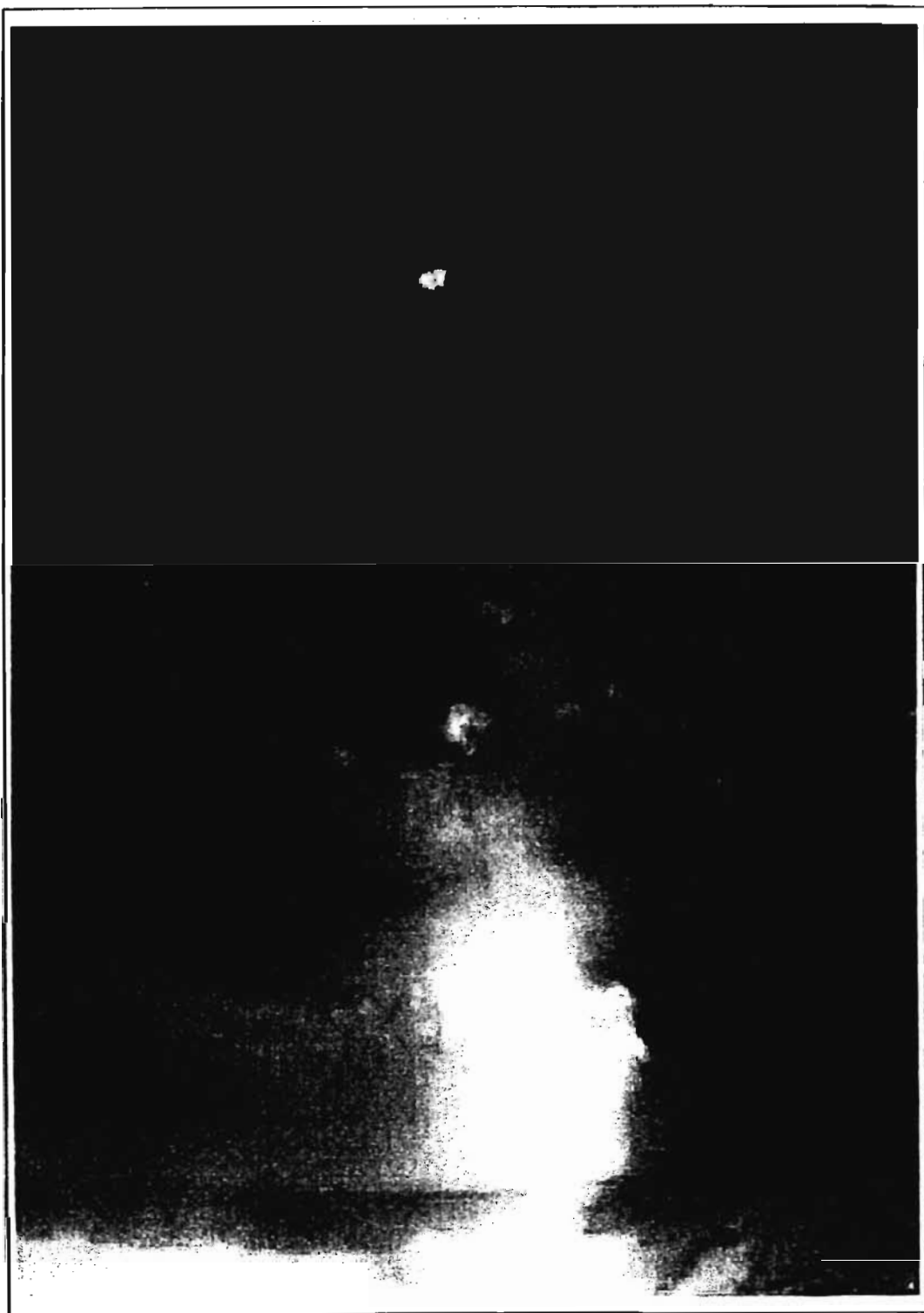
12/2/05 1022
Hangers on 18" & and
22" & Stainless Steel Ducts
11:25 A.M.

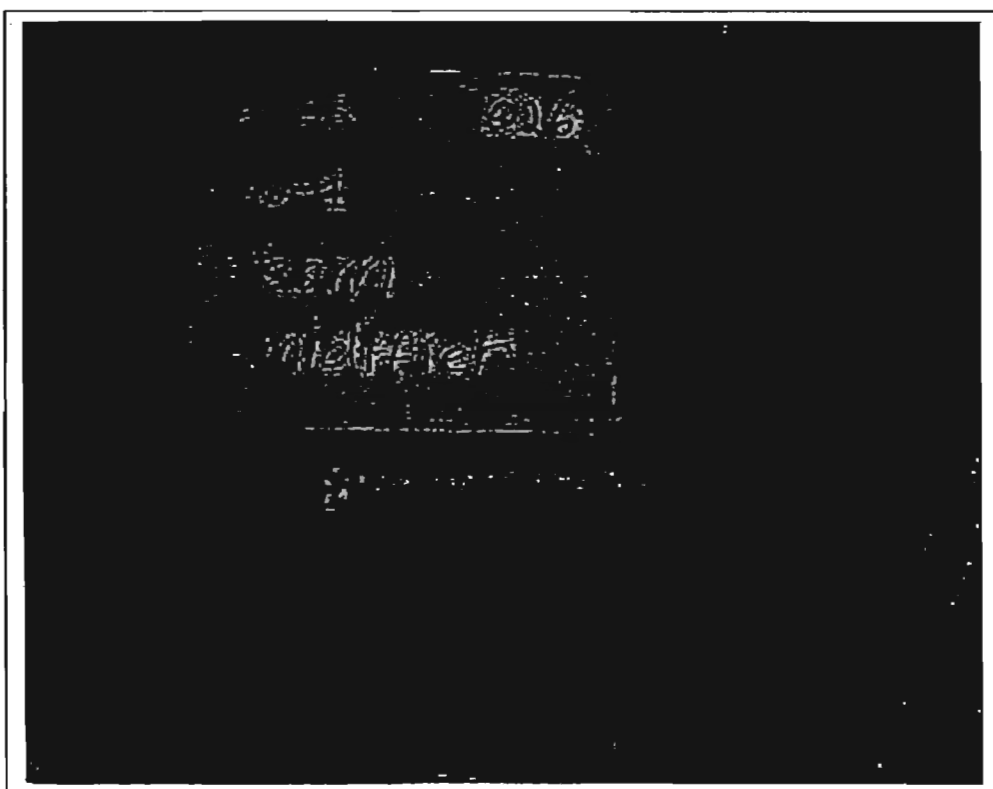
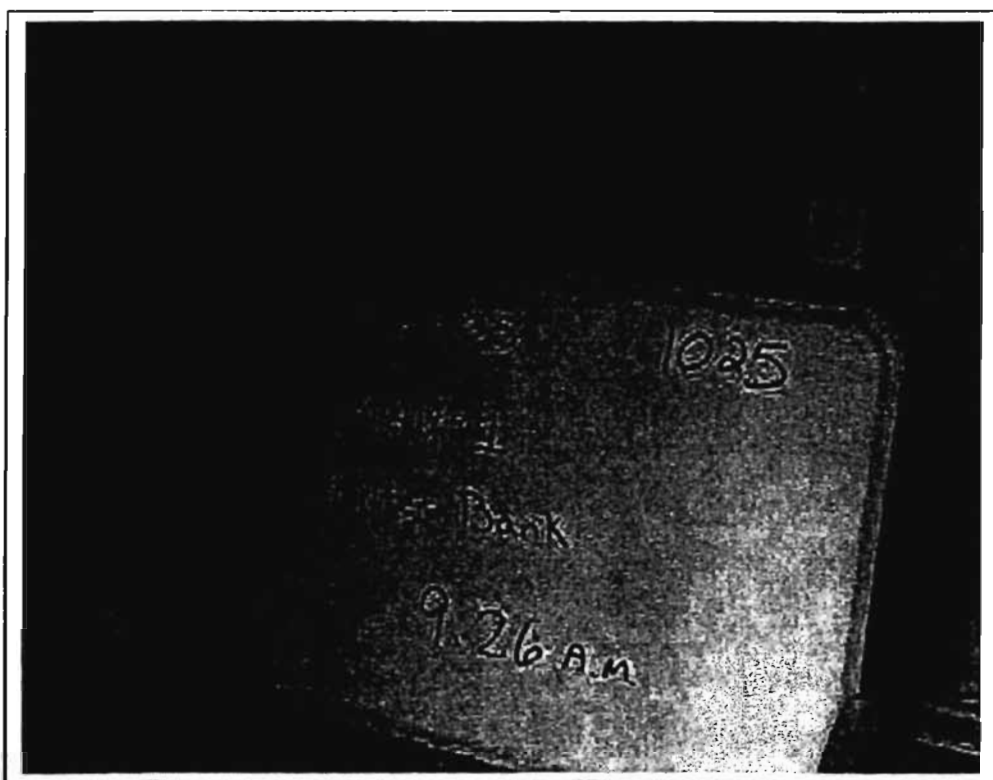


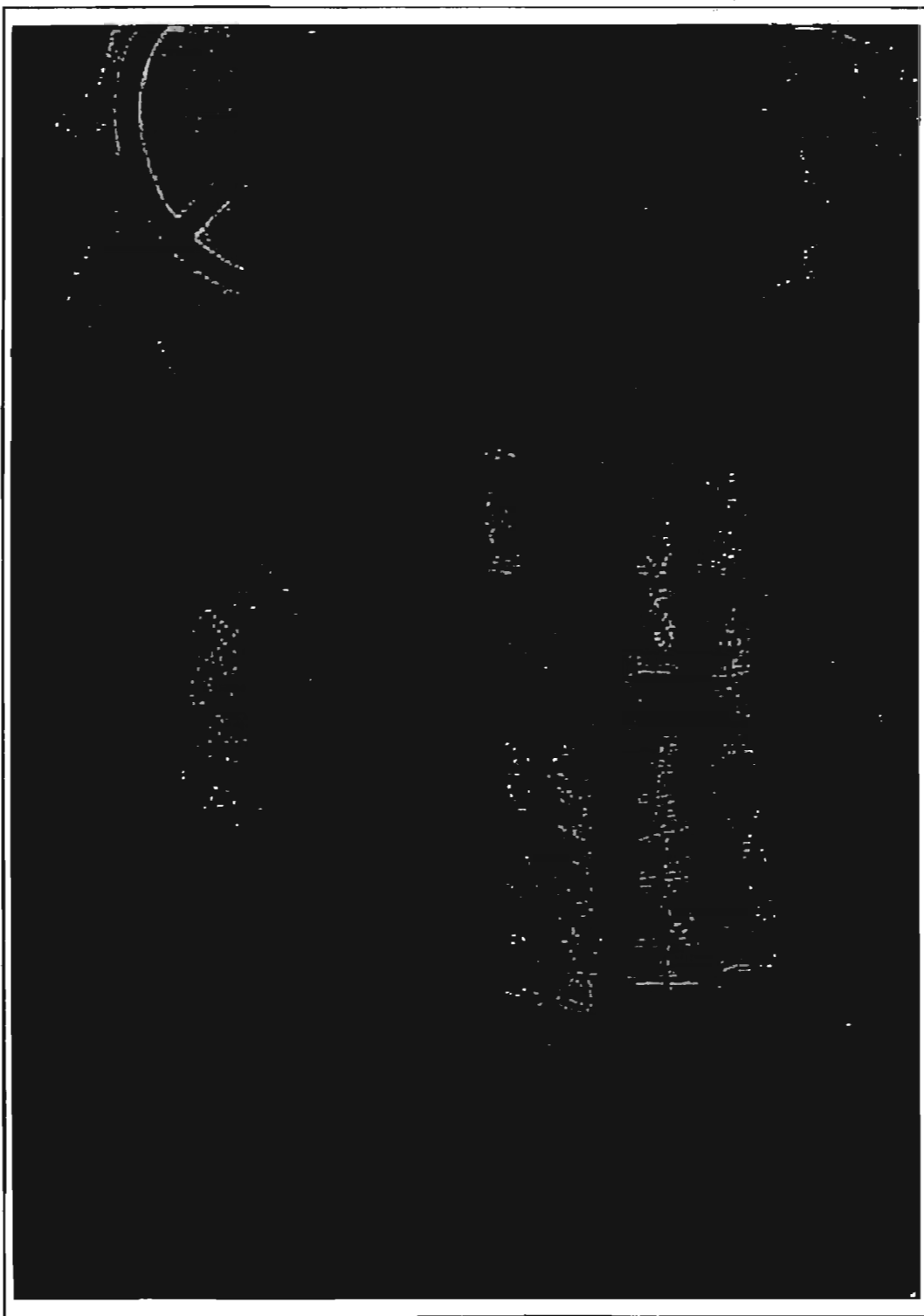




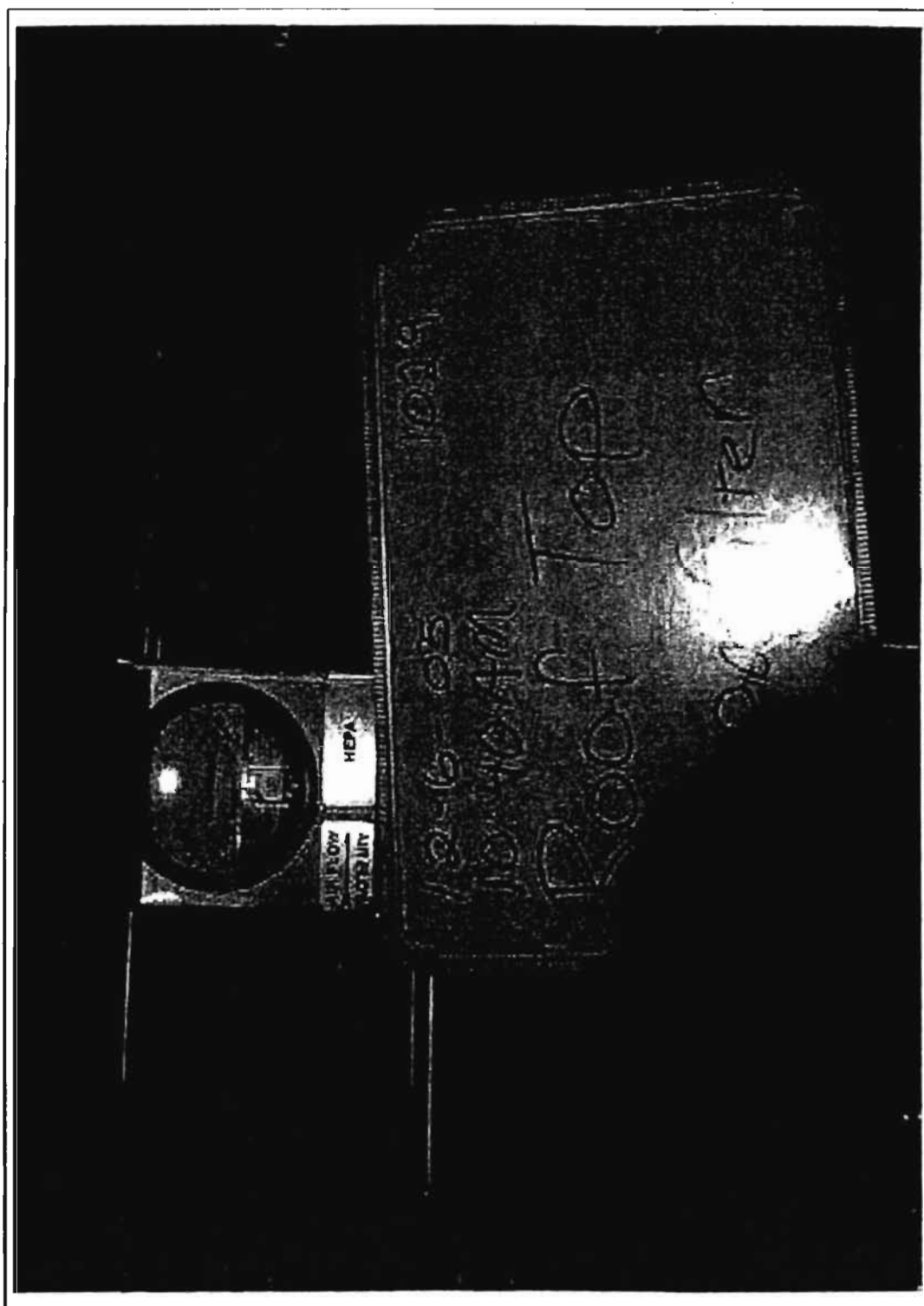


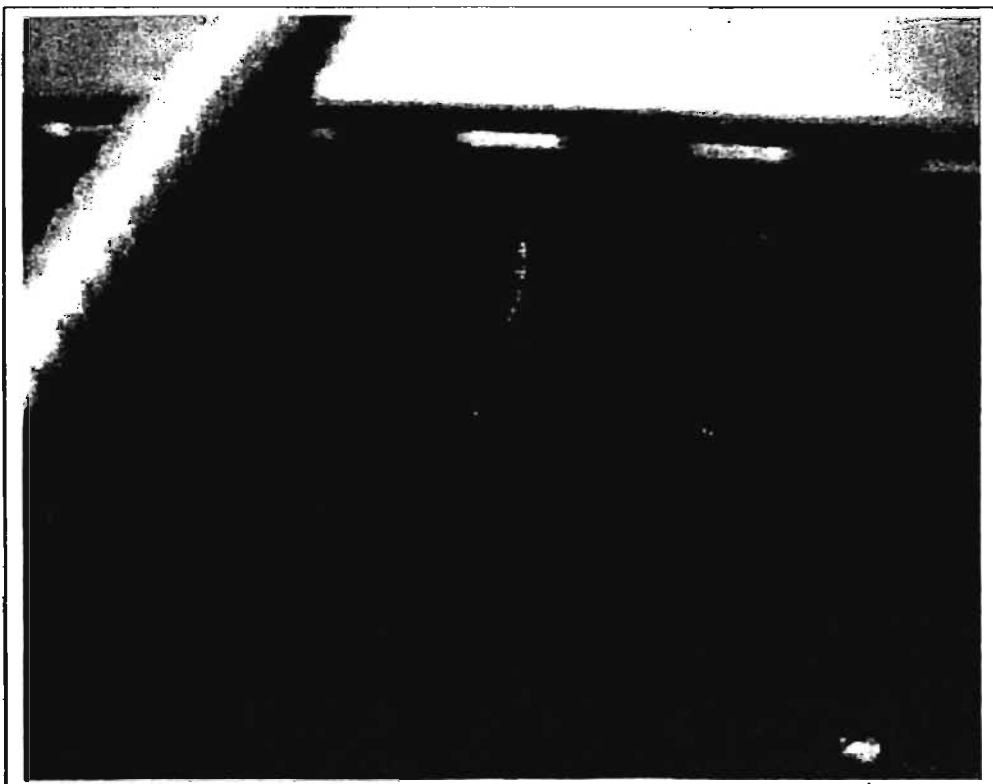
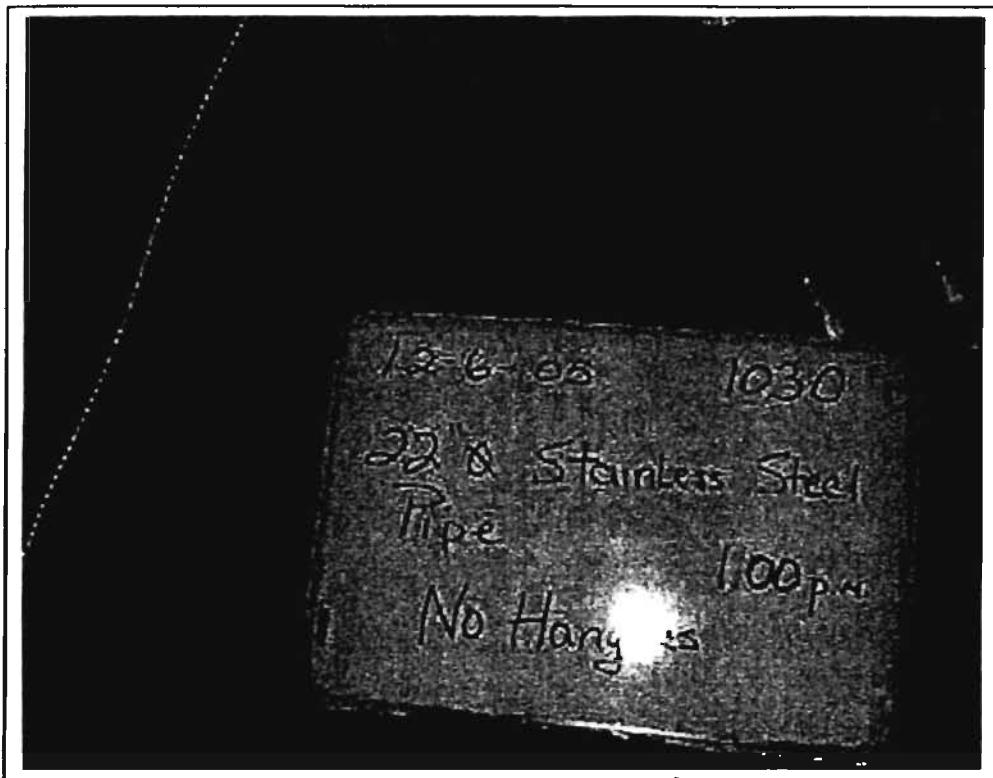


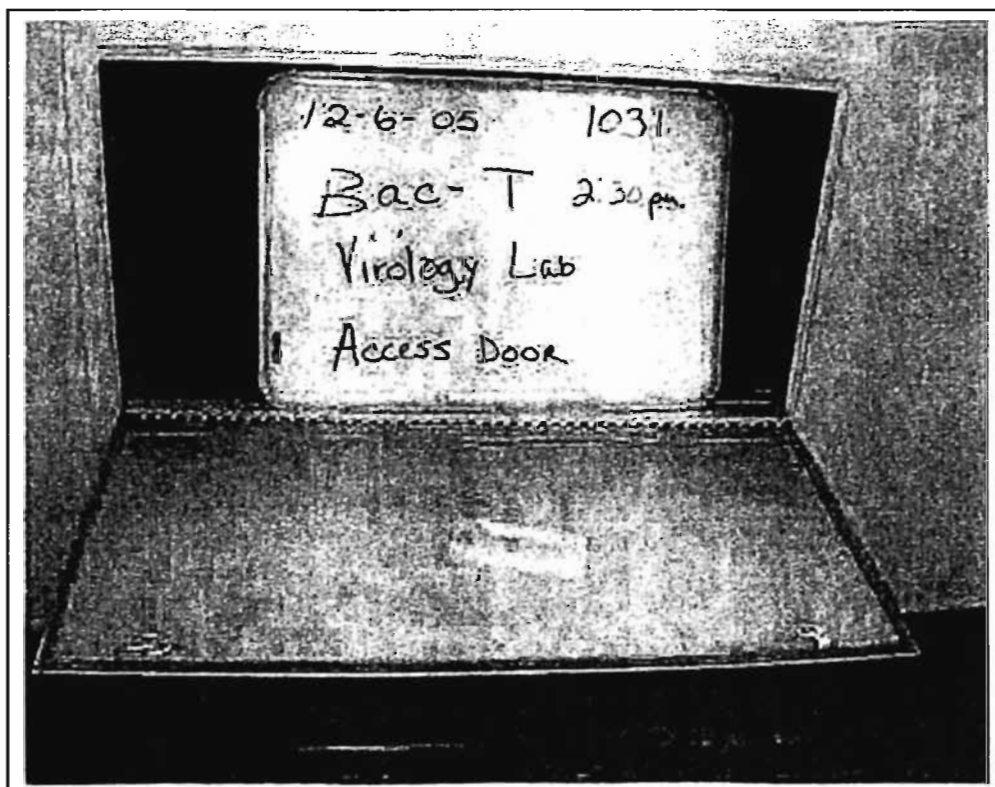
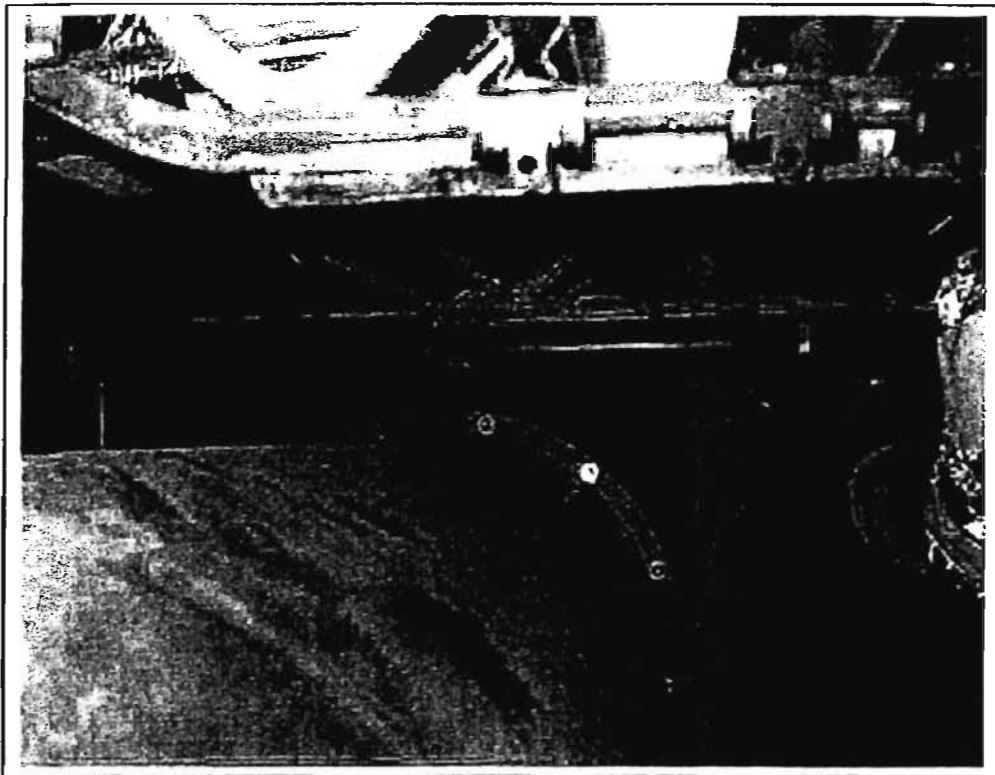












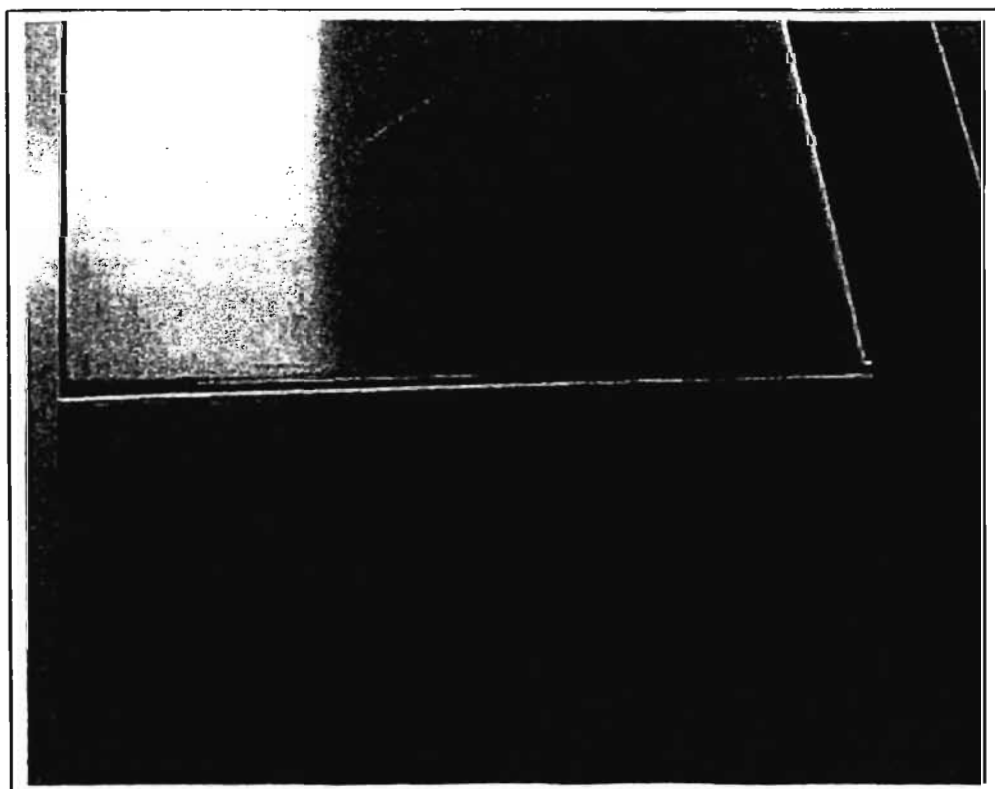
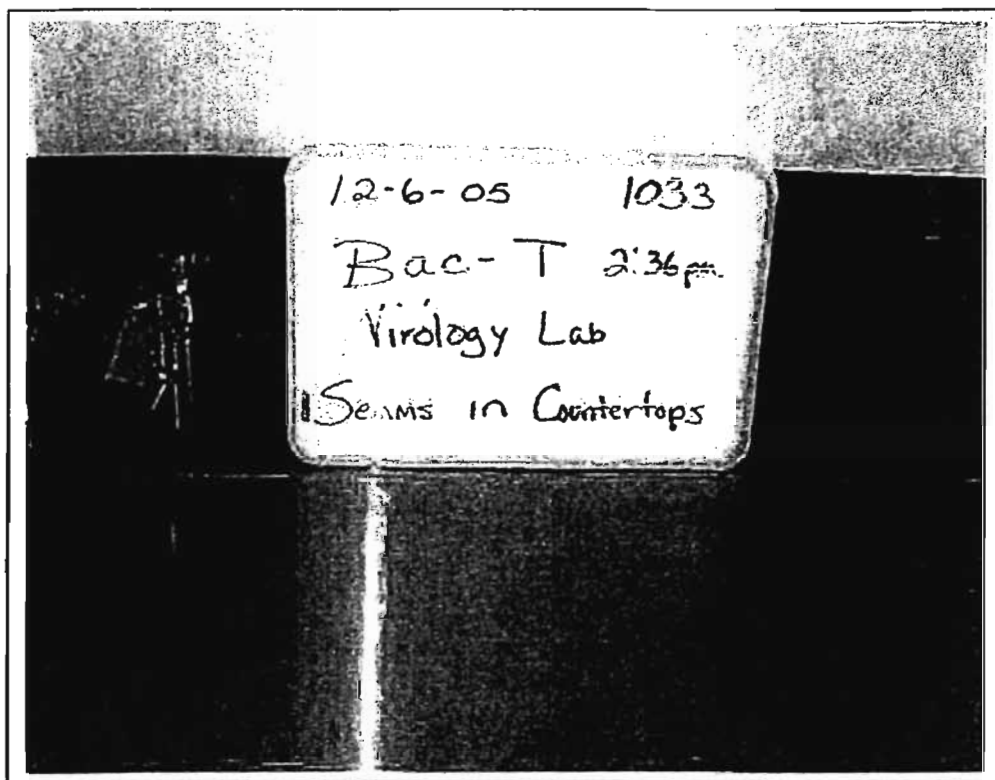
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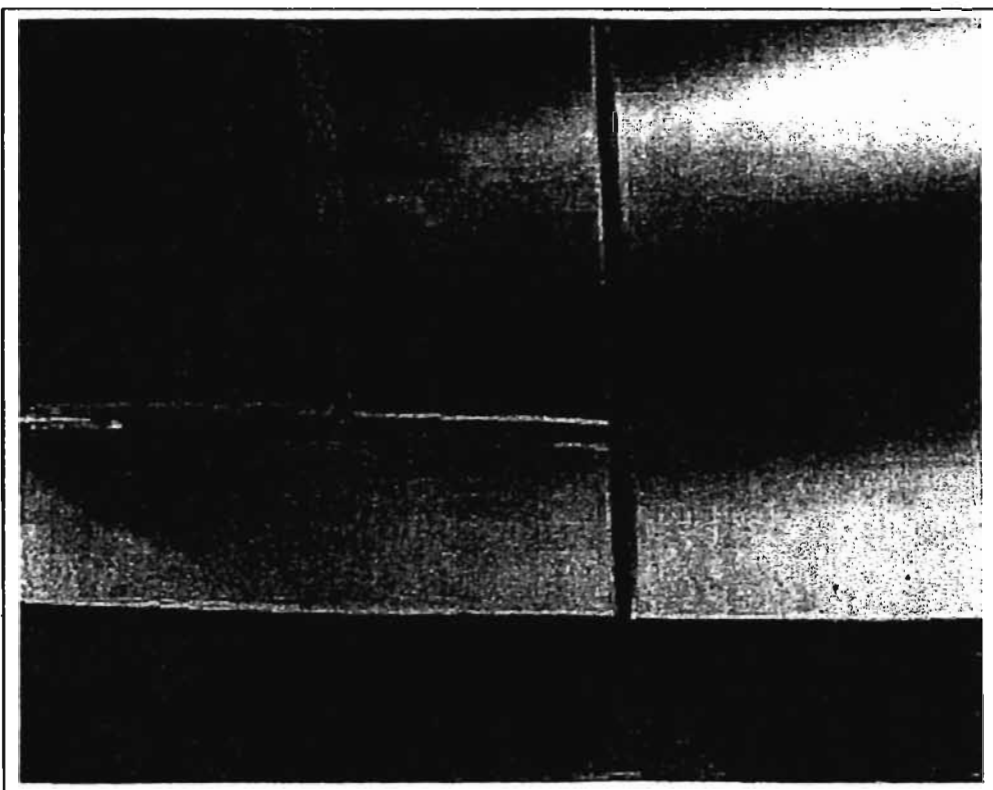
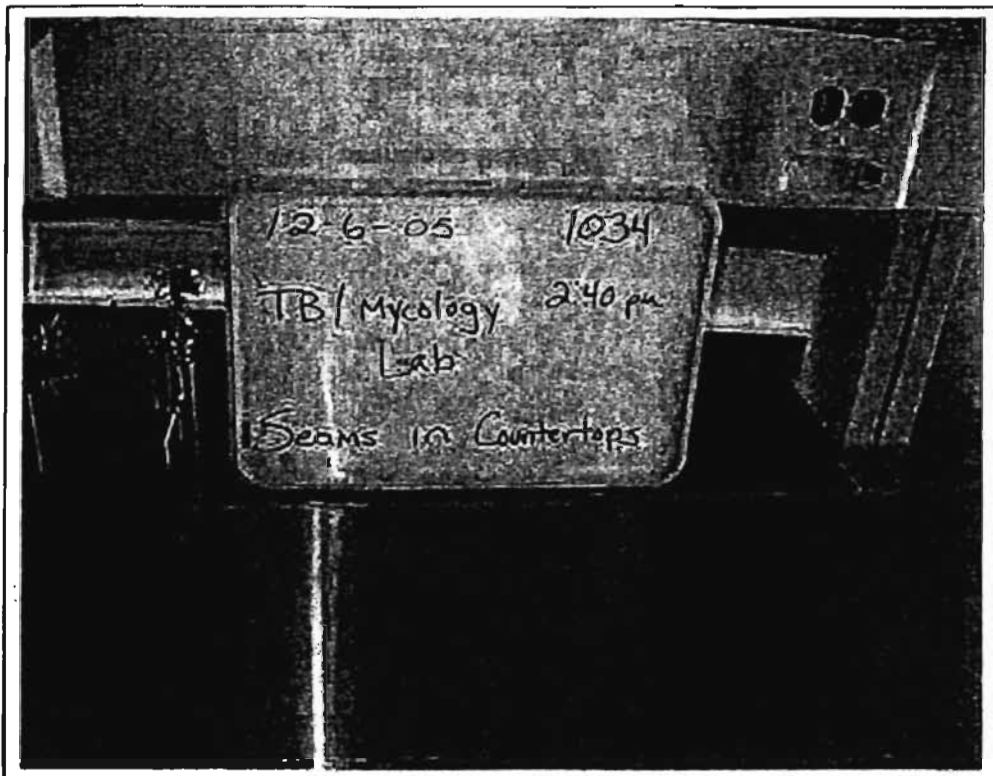
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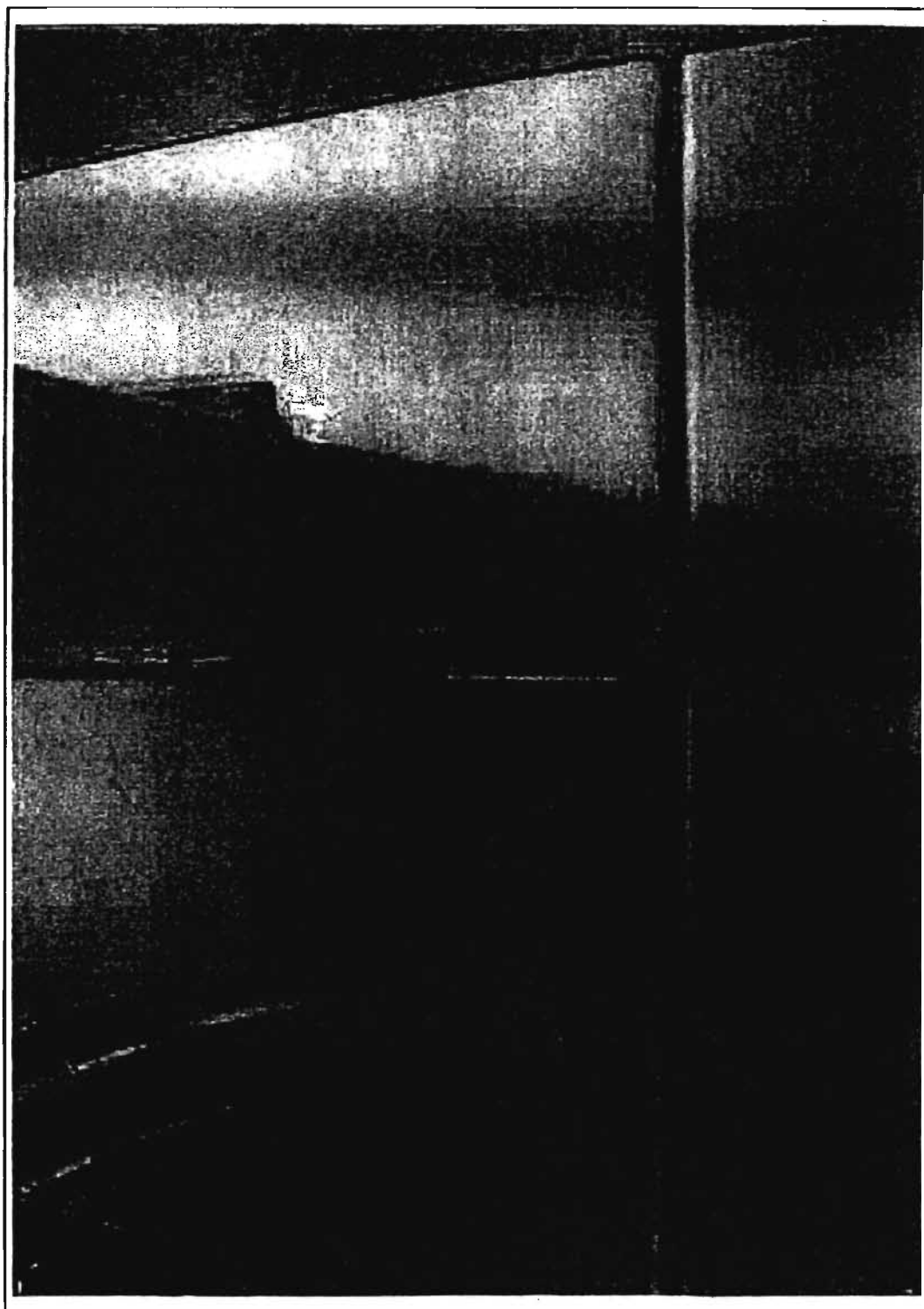
Bac-T 2:33pm

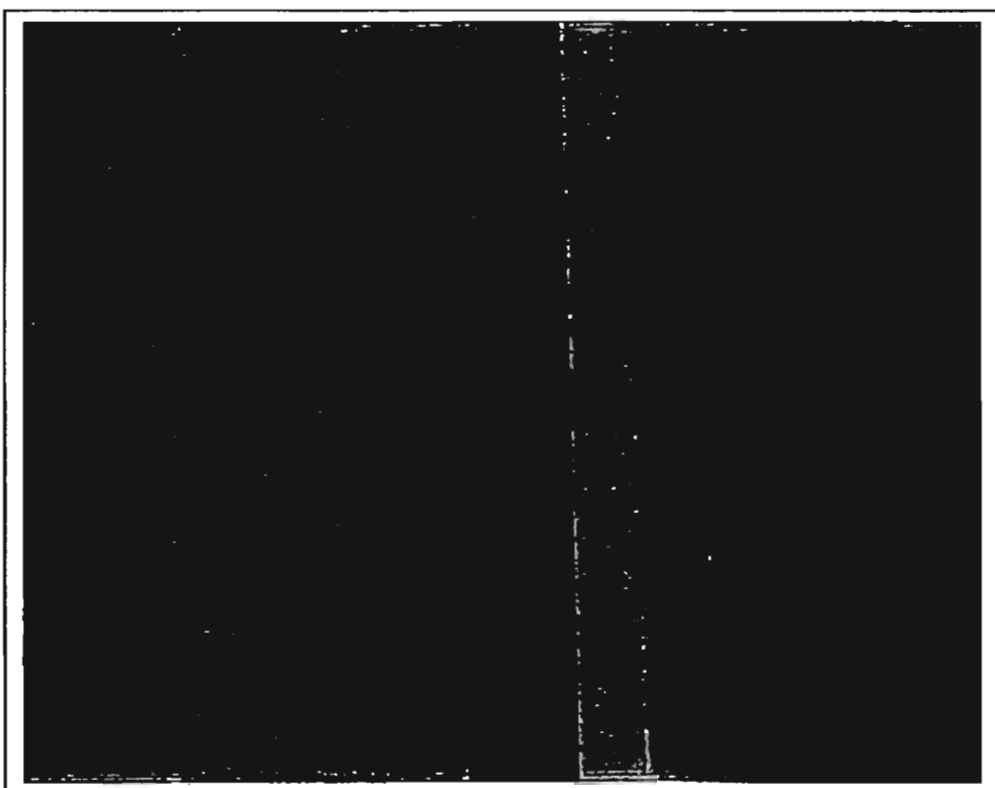
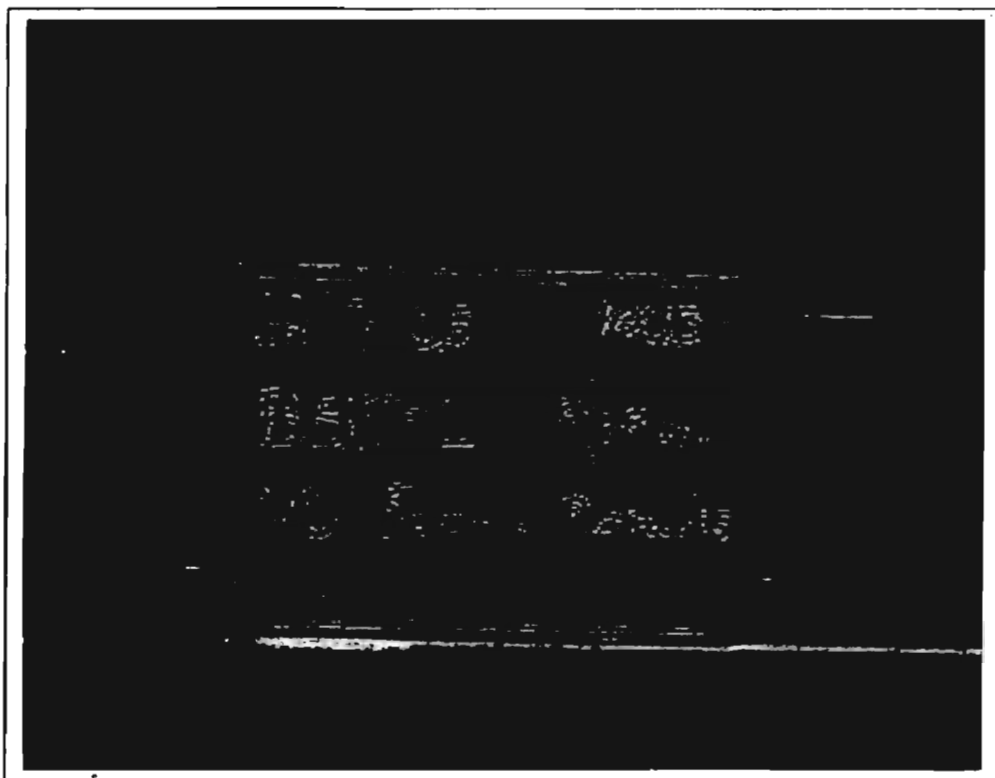
Virology Lab

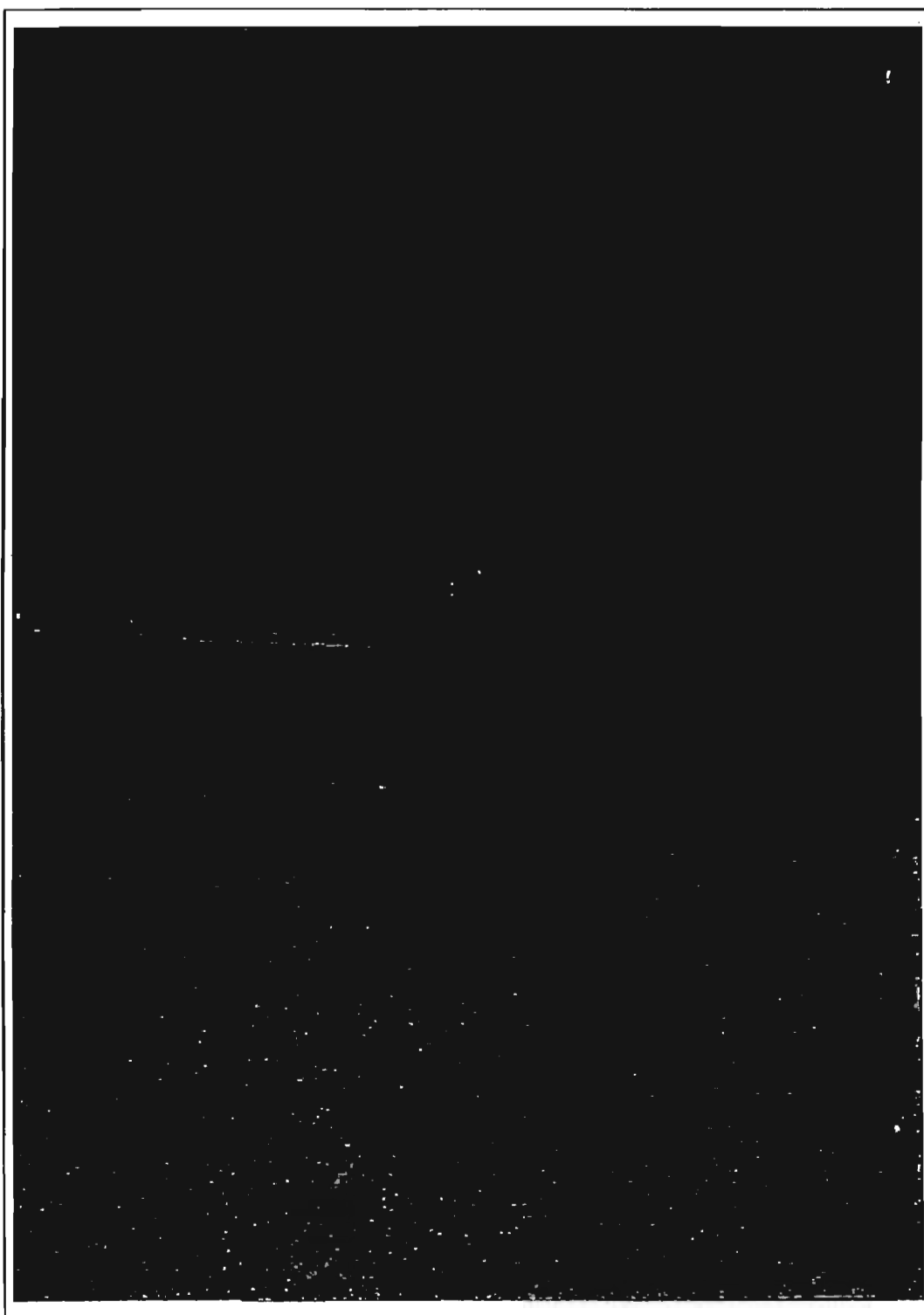
Cap in lights

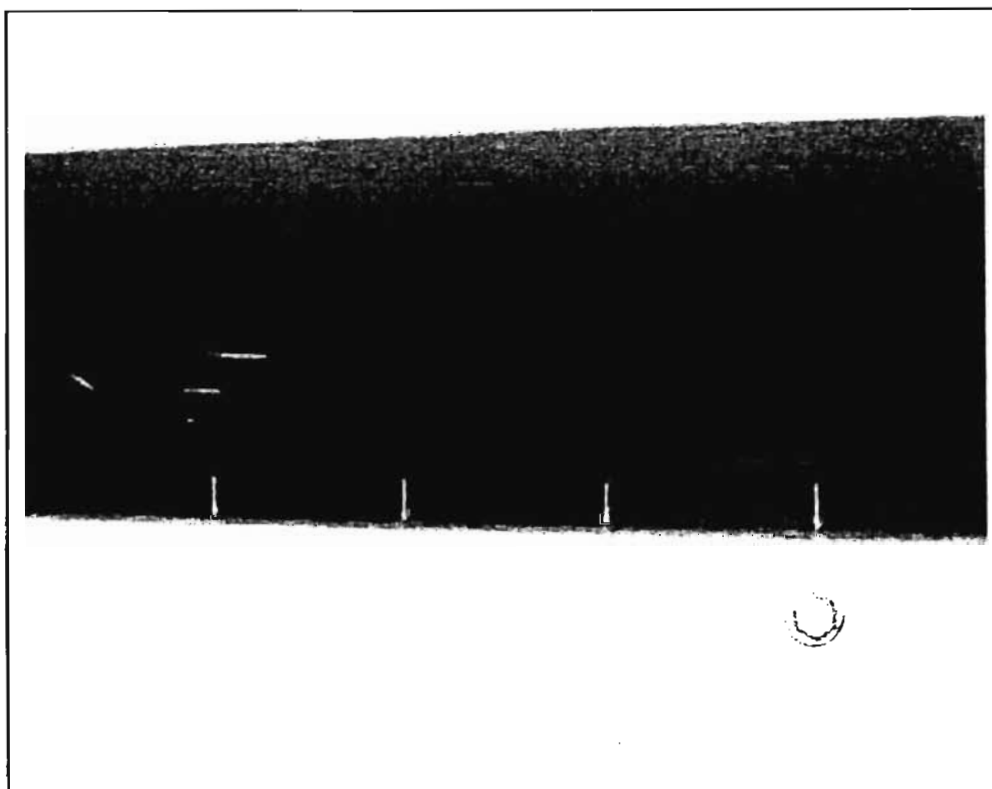
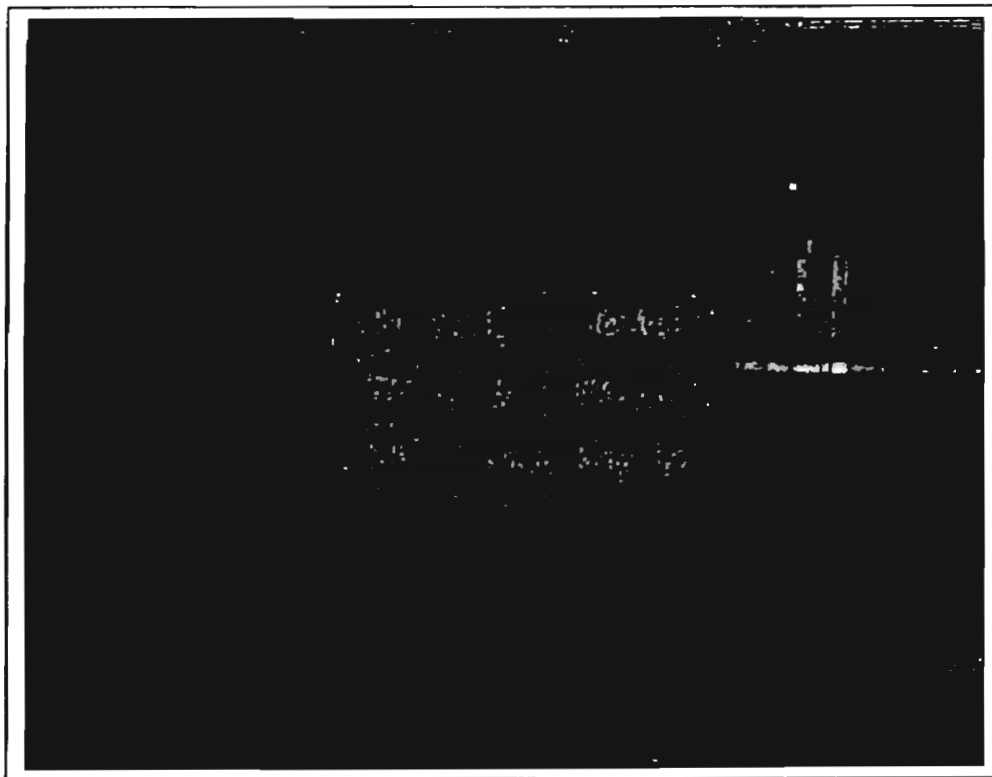




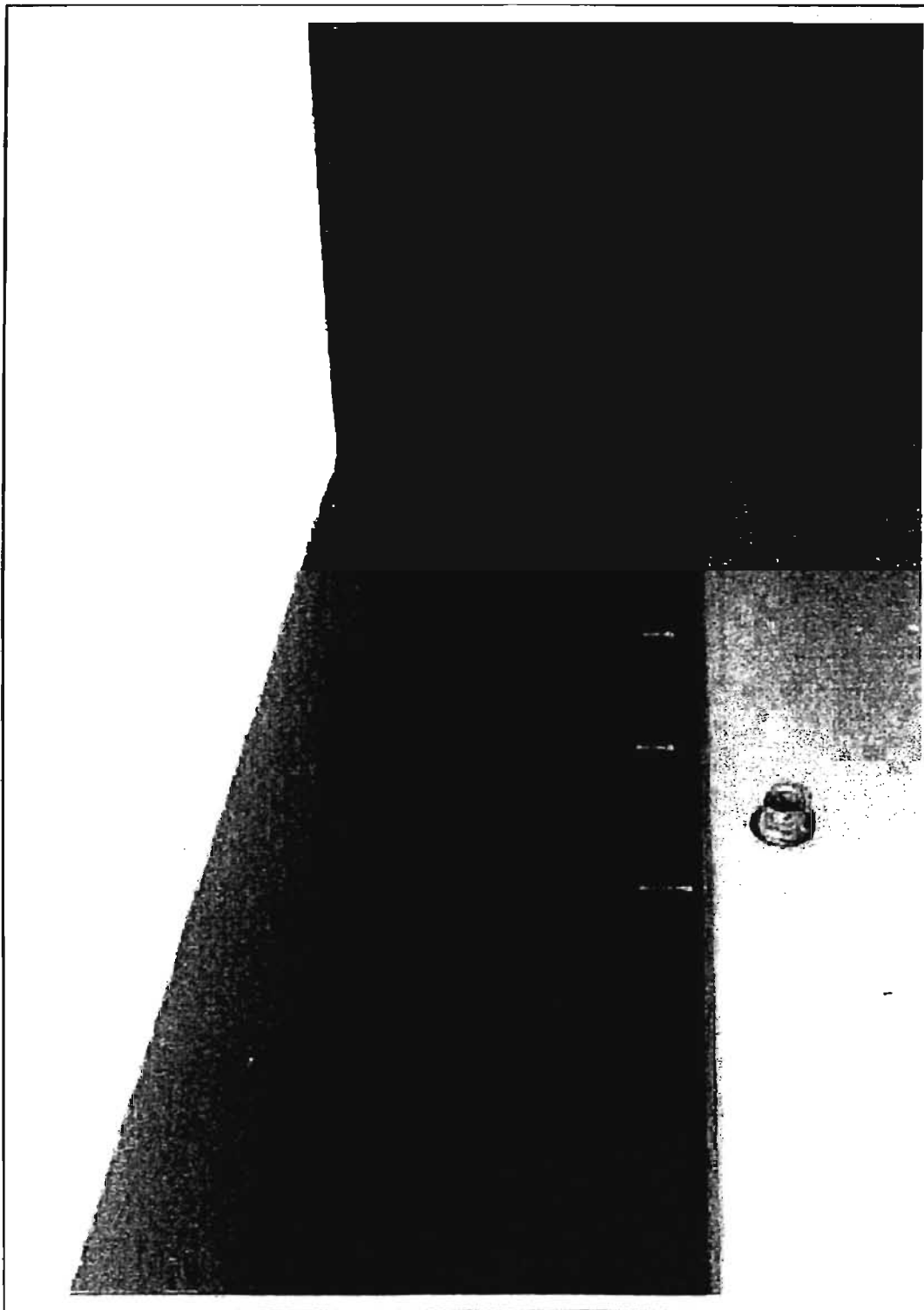


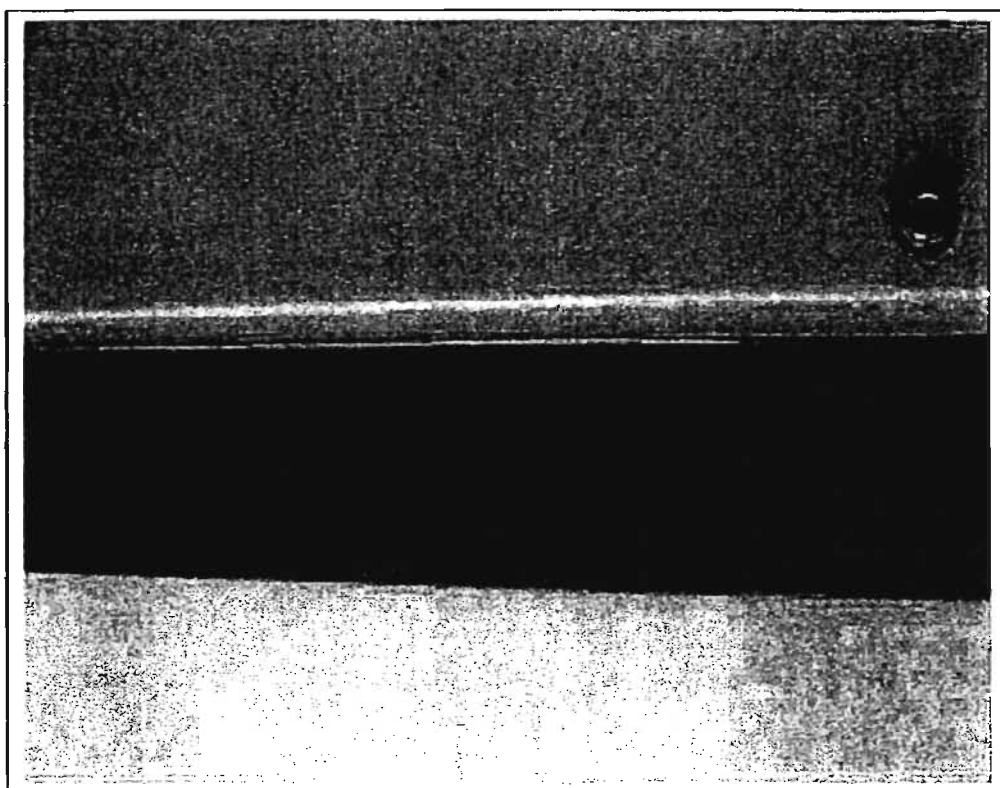
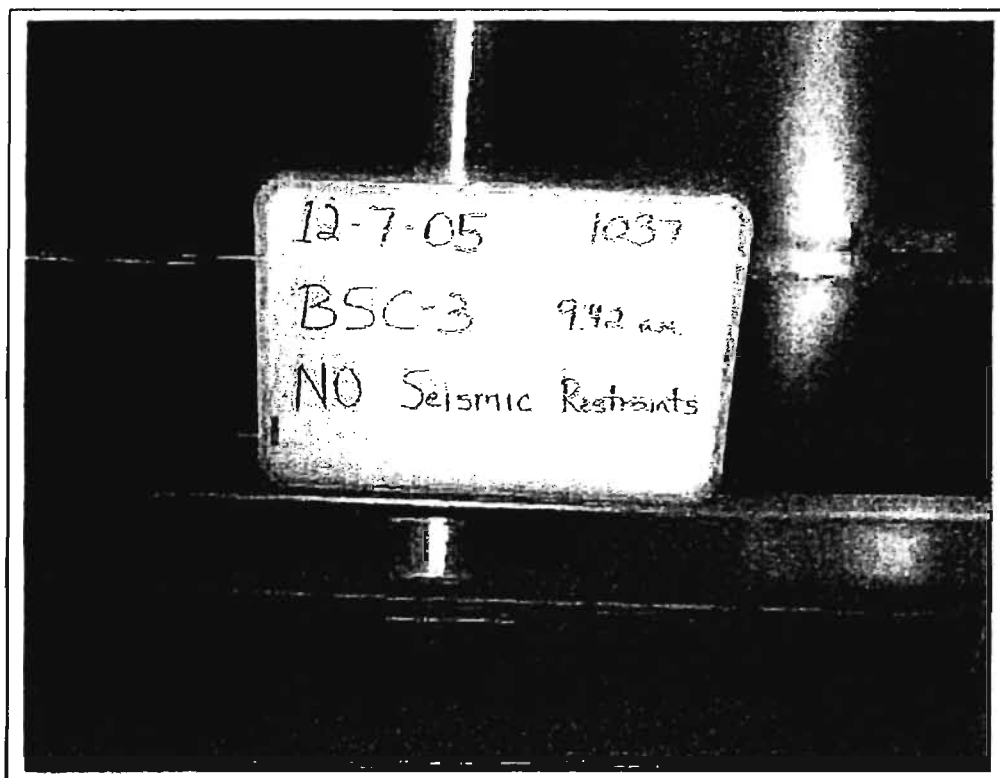


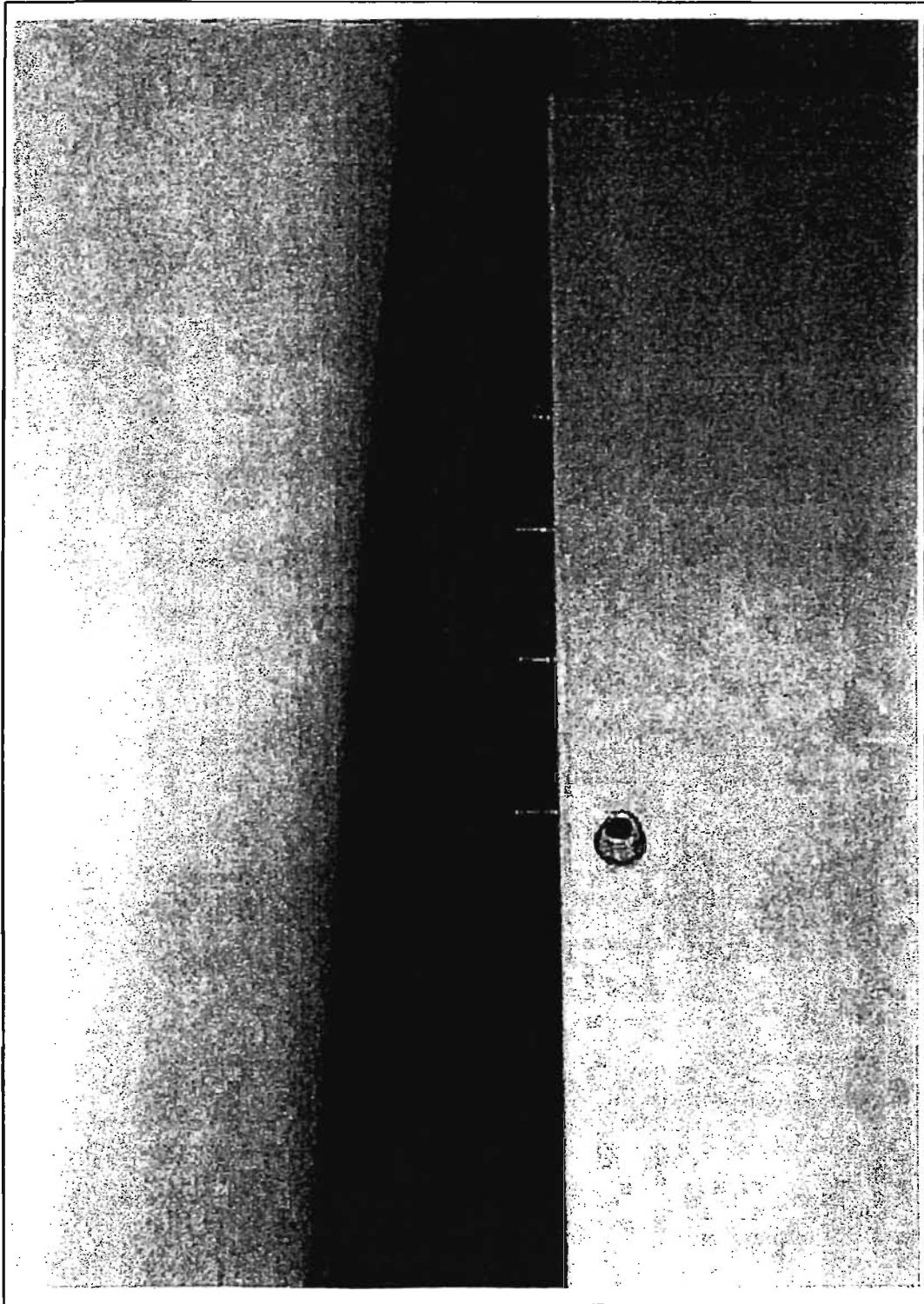


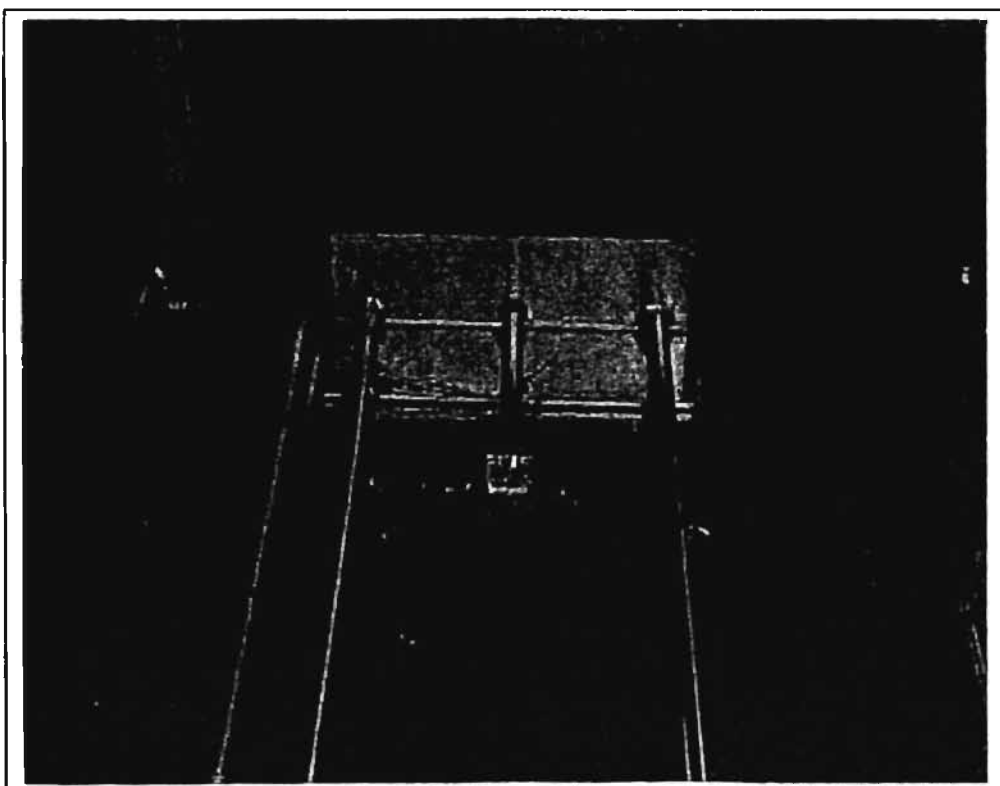


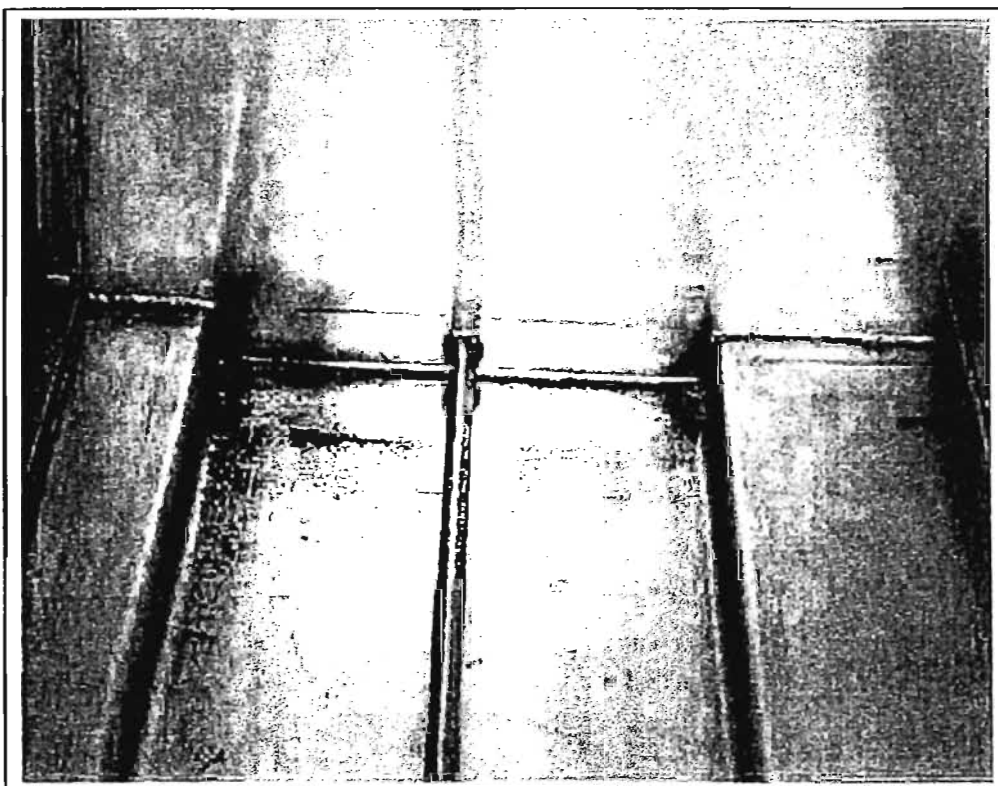
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C.S.

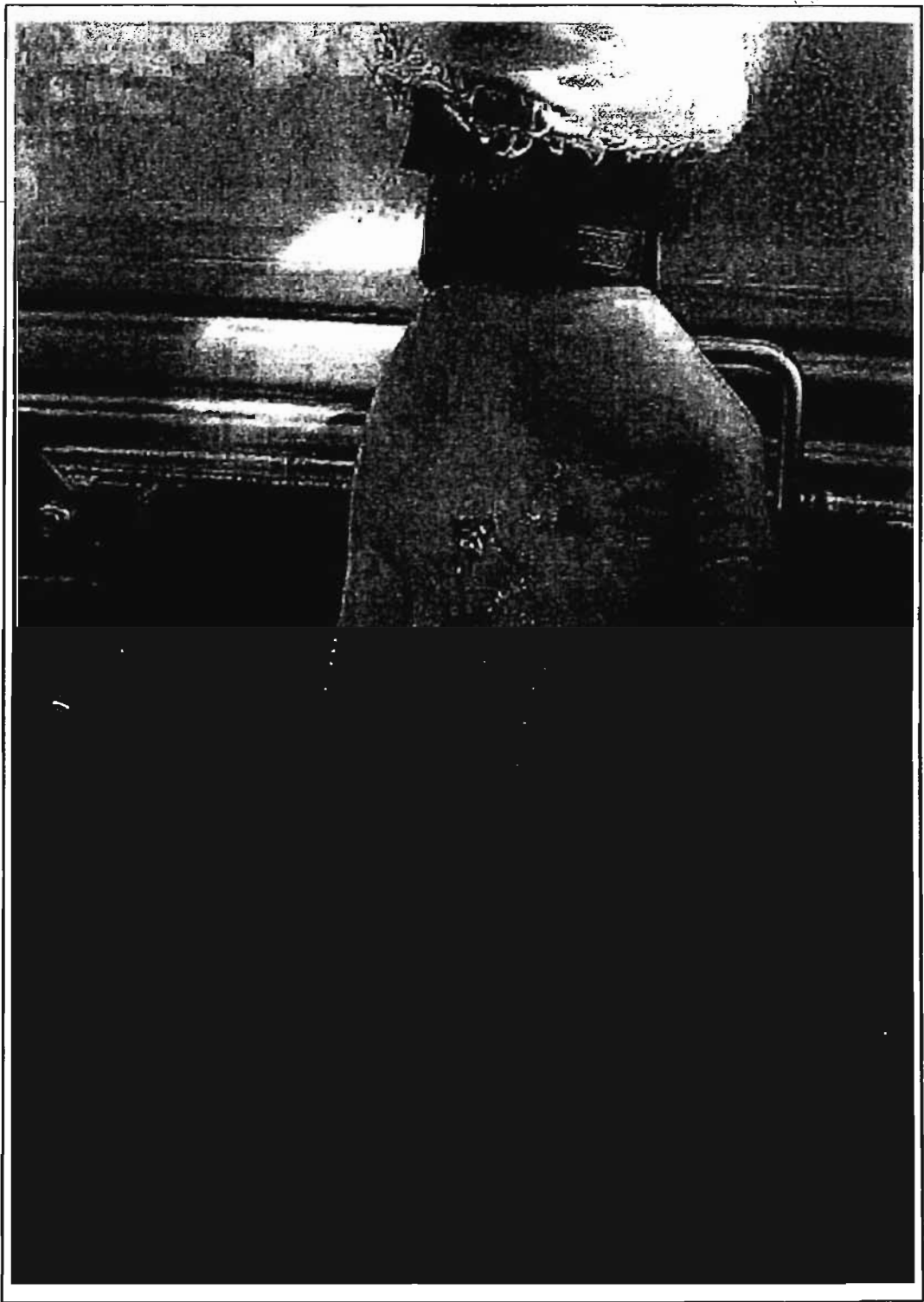


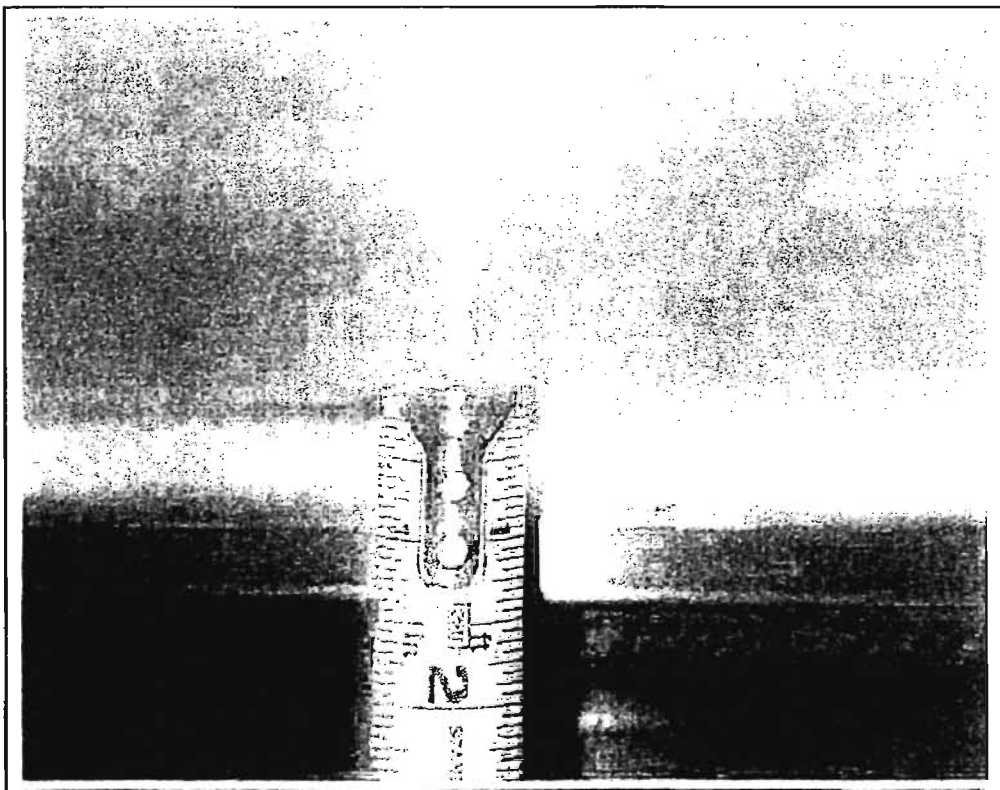


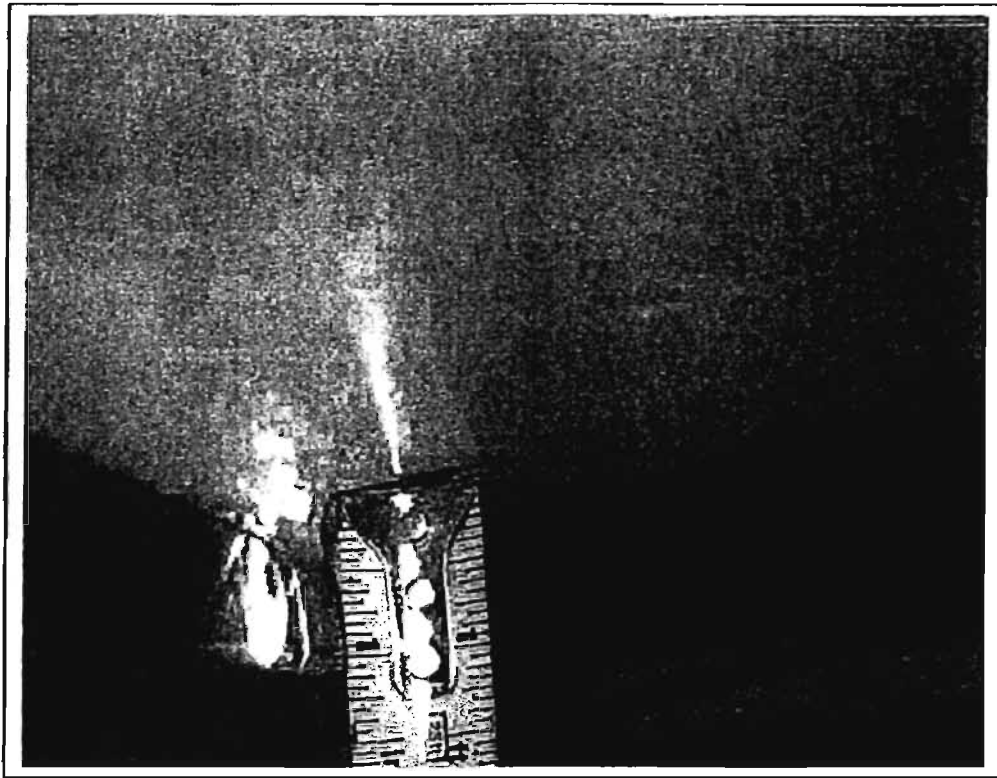


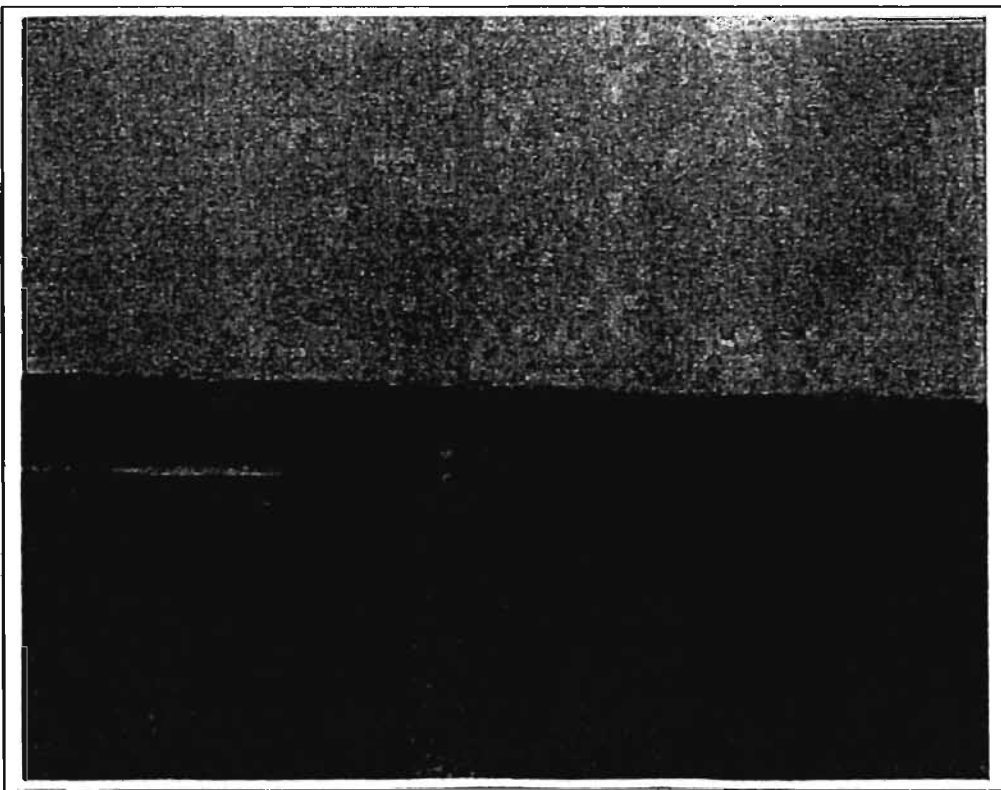


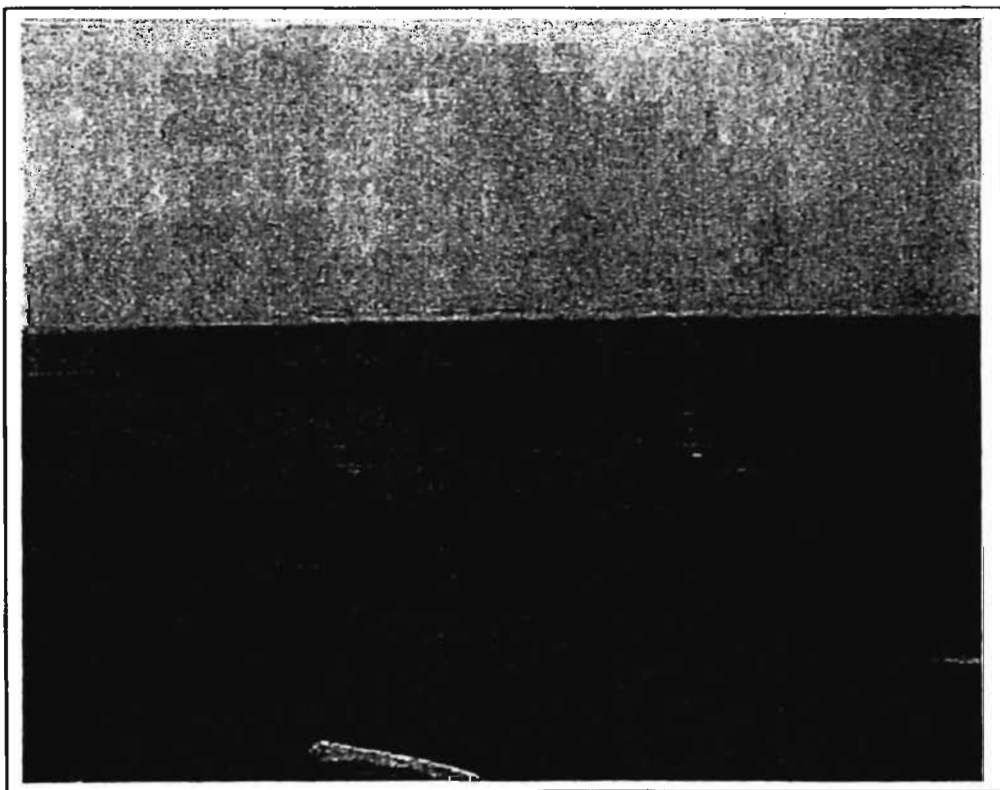


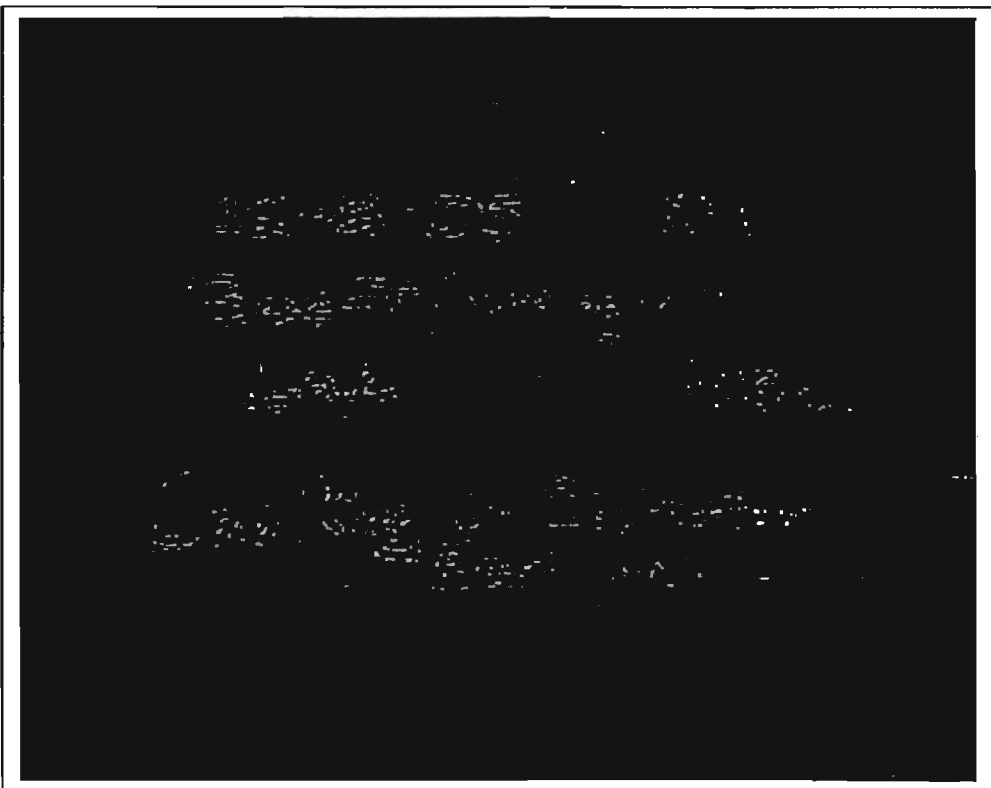
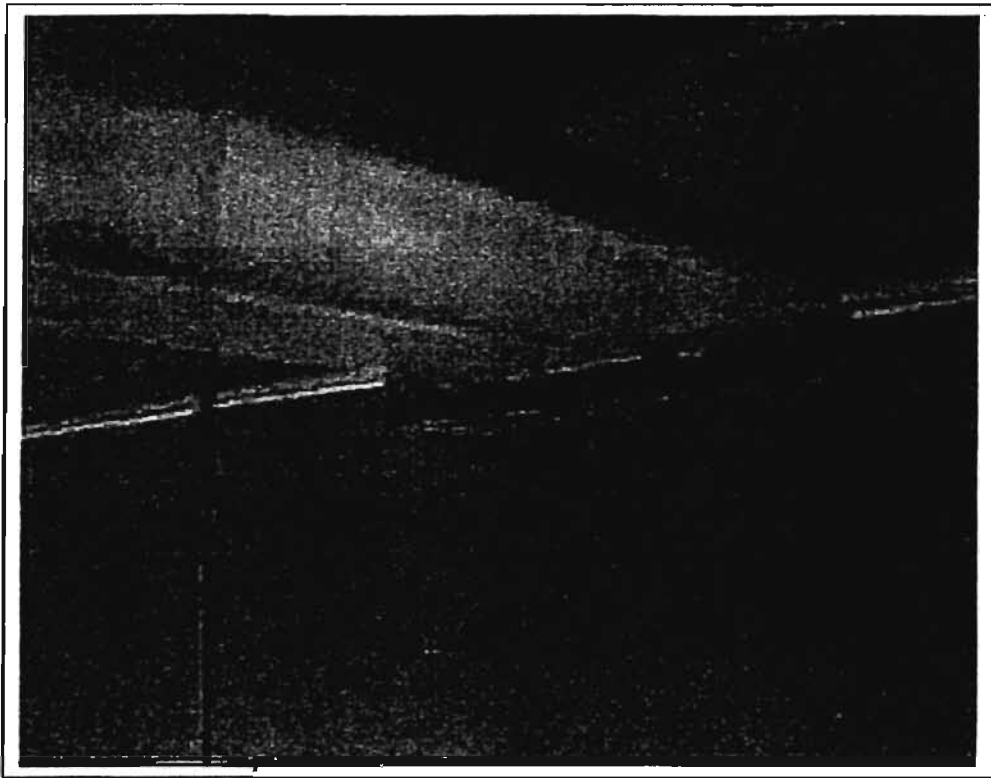


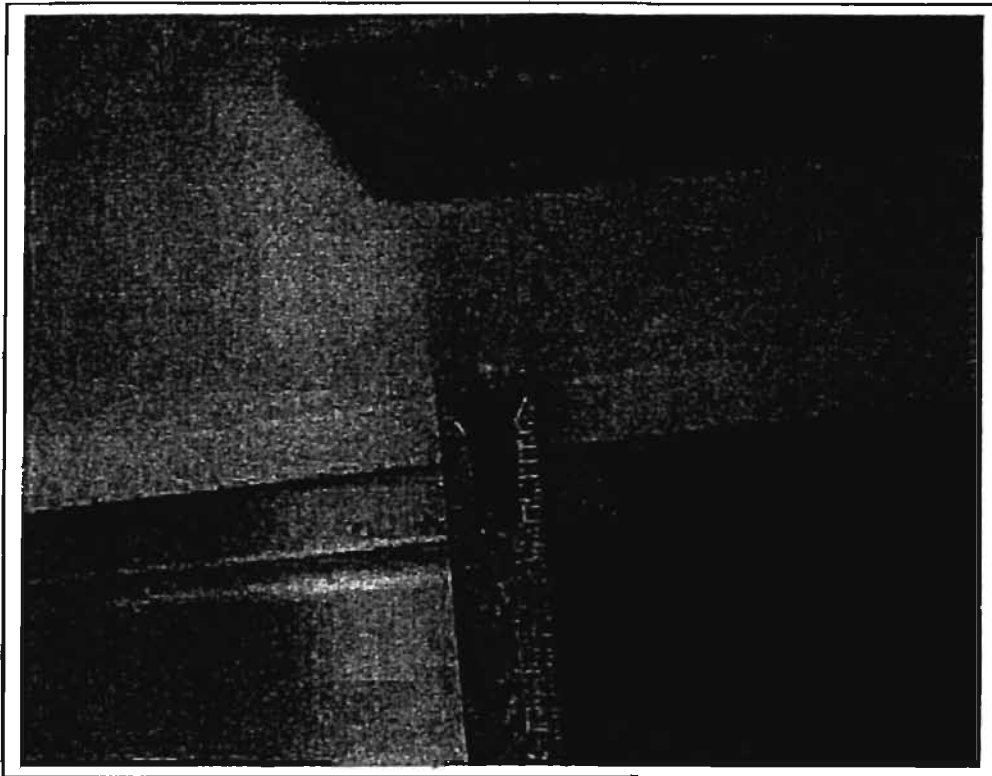


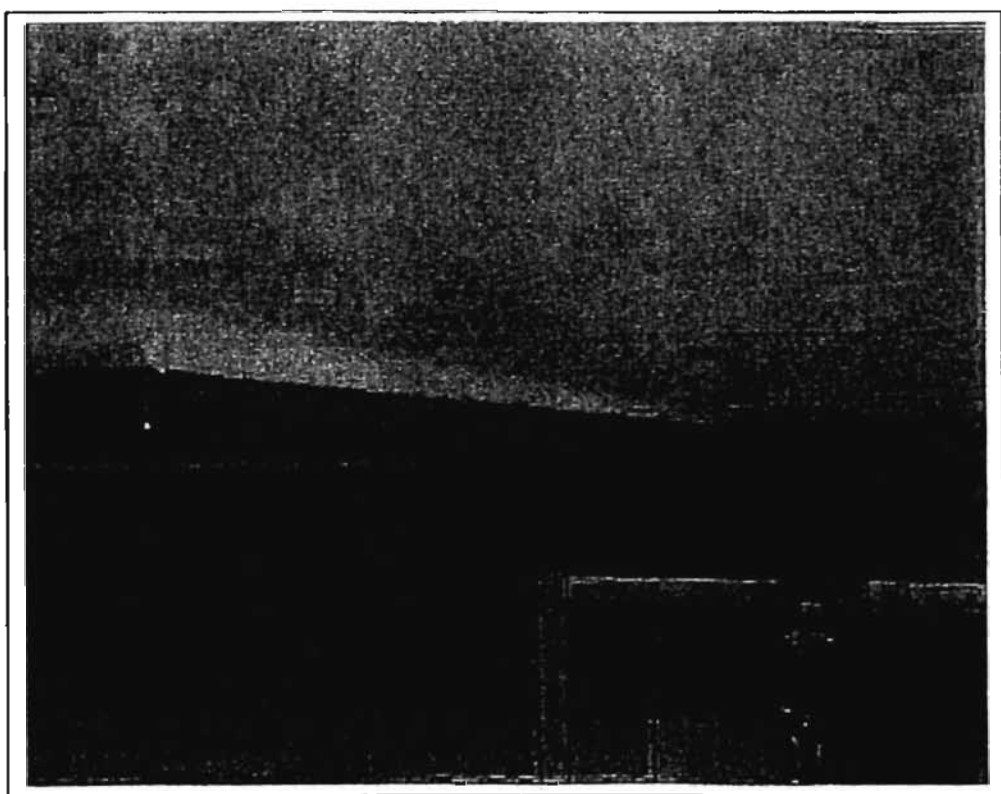
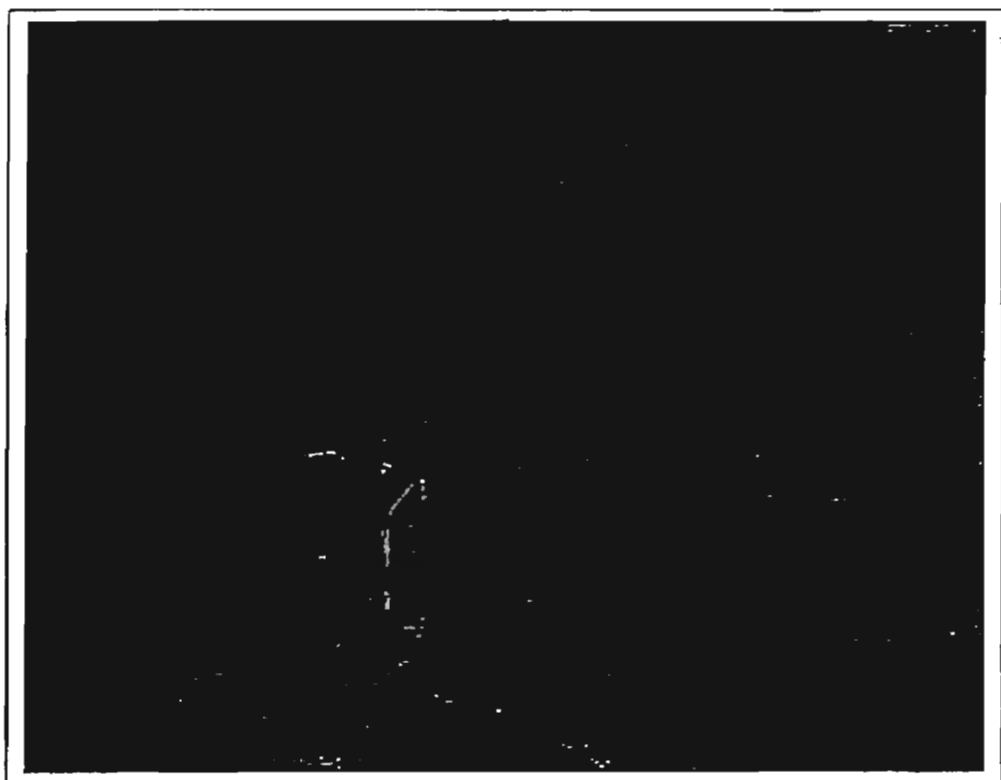


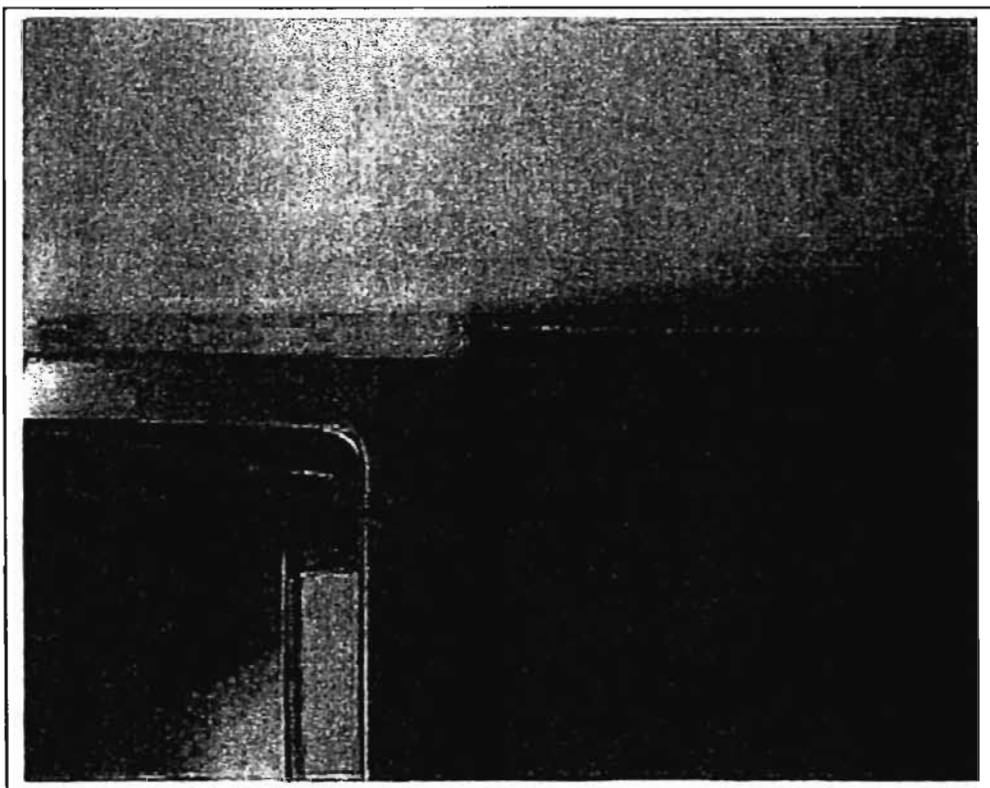
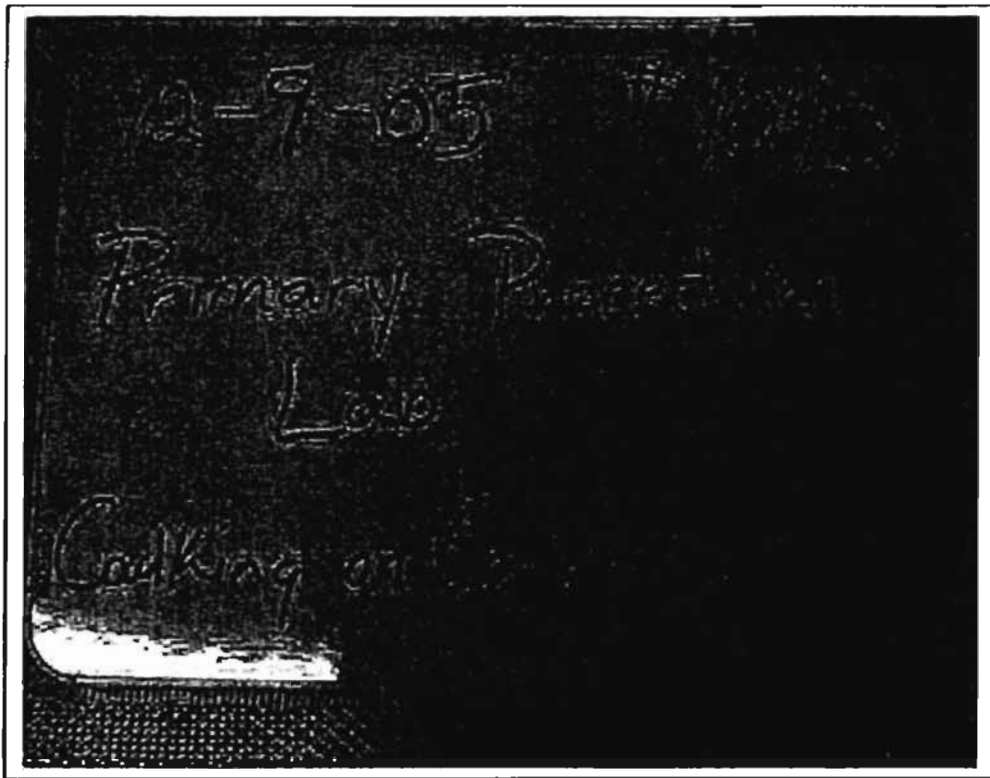


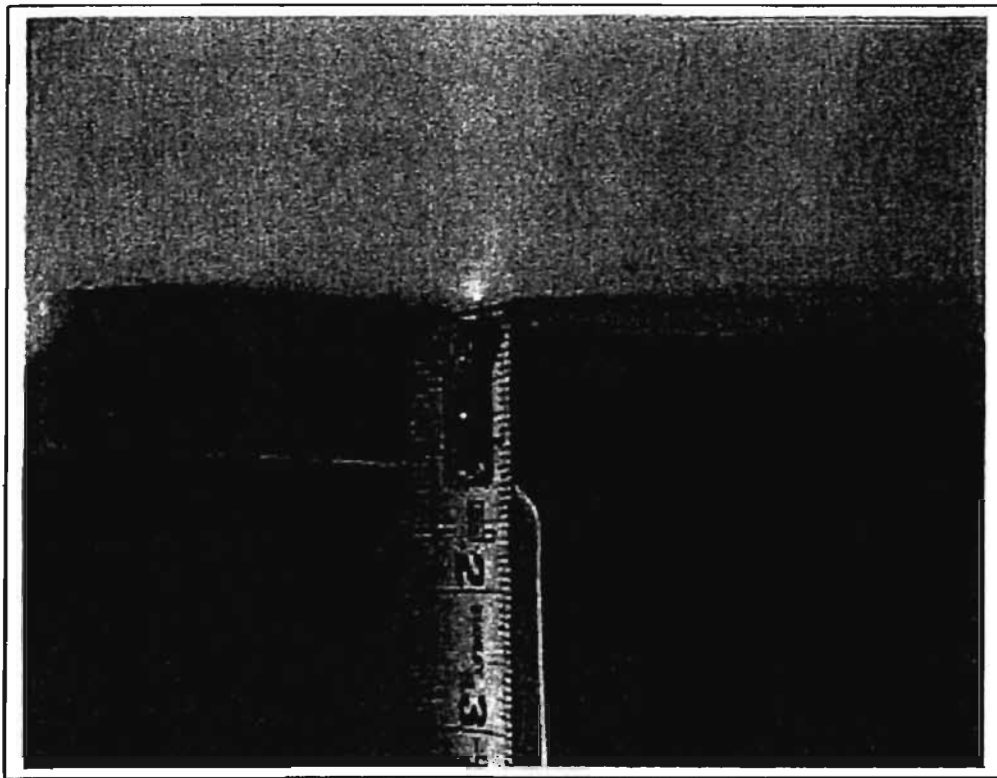


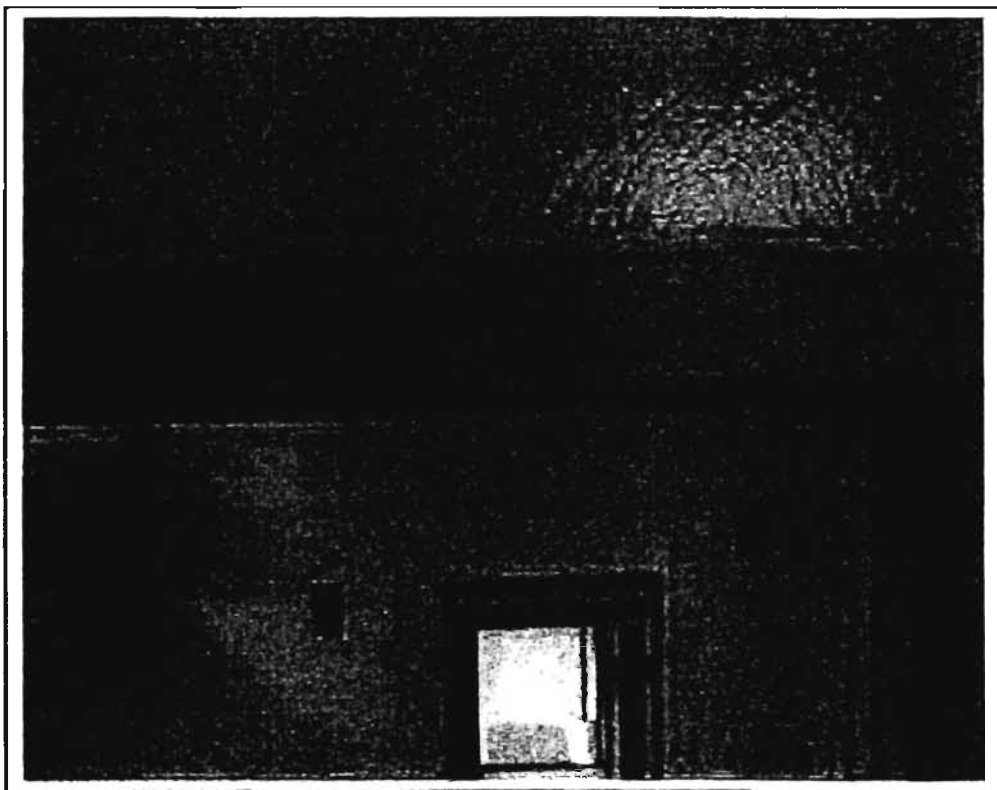
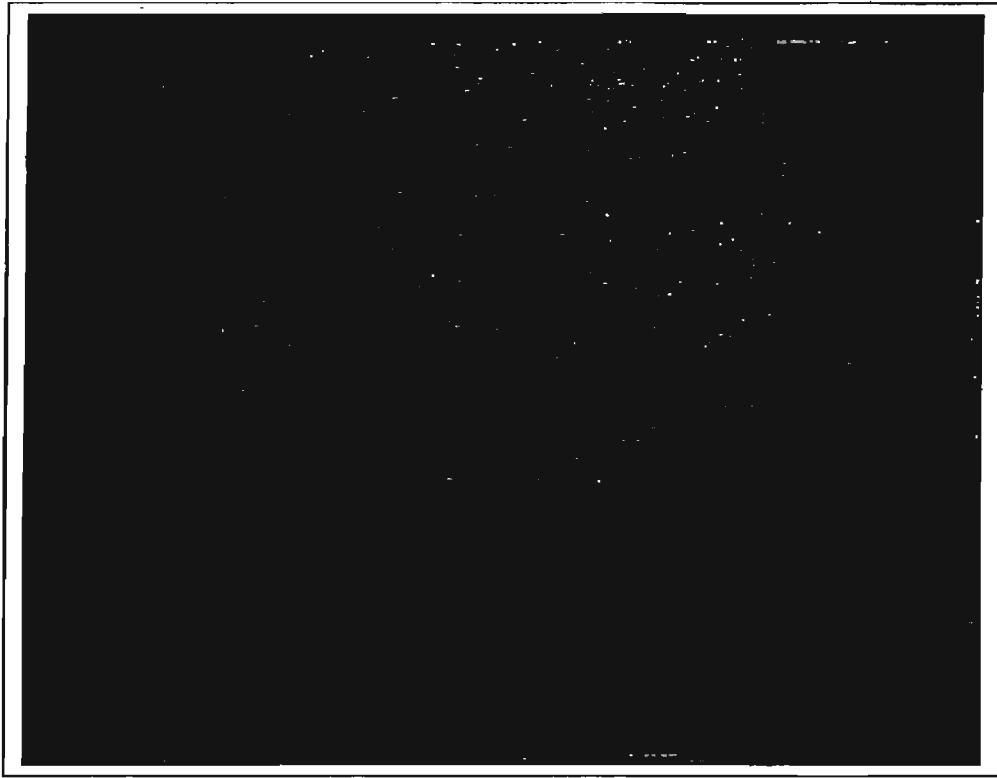


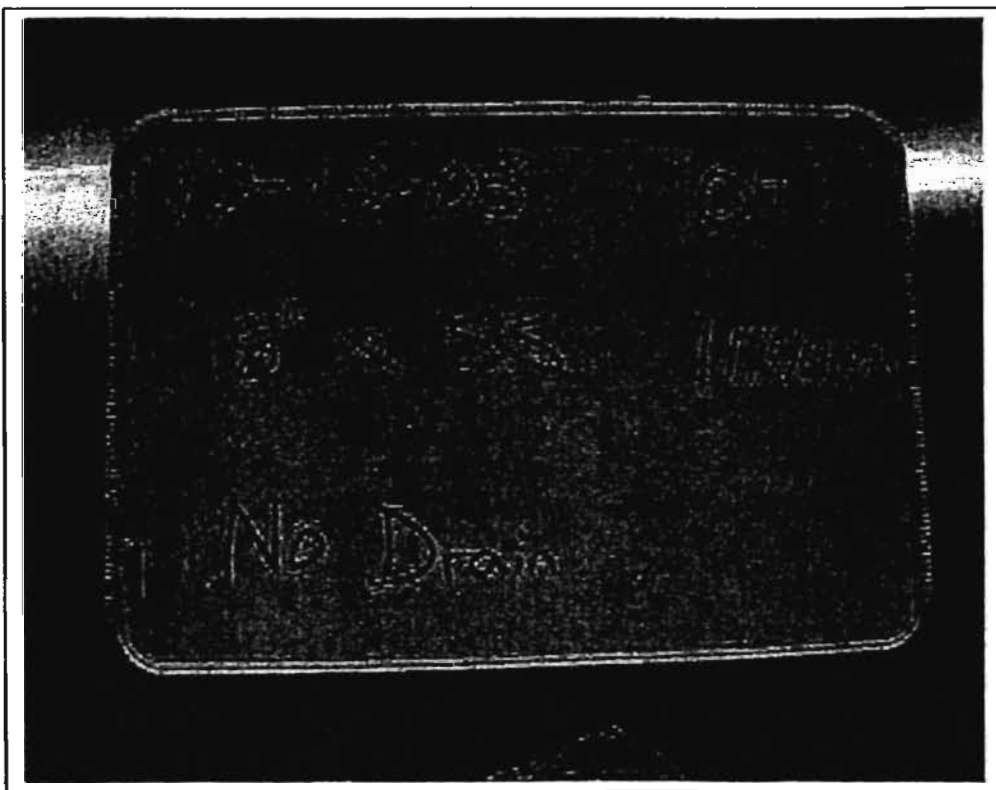
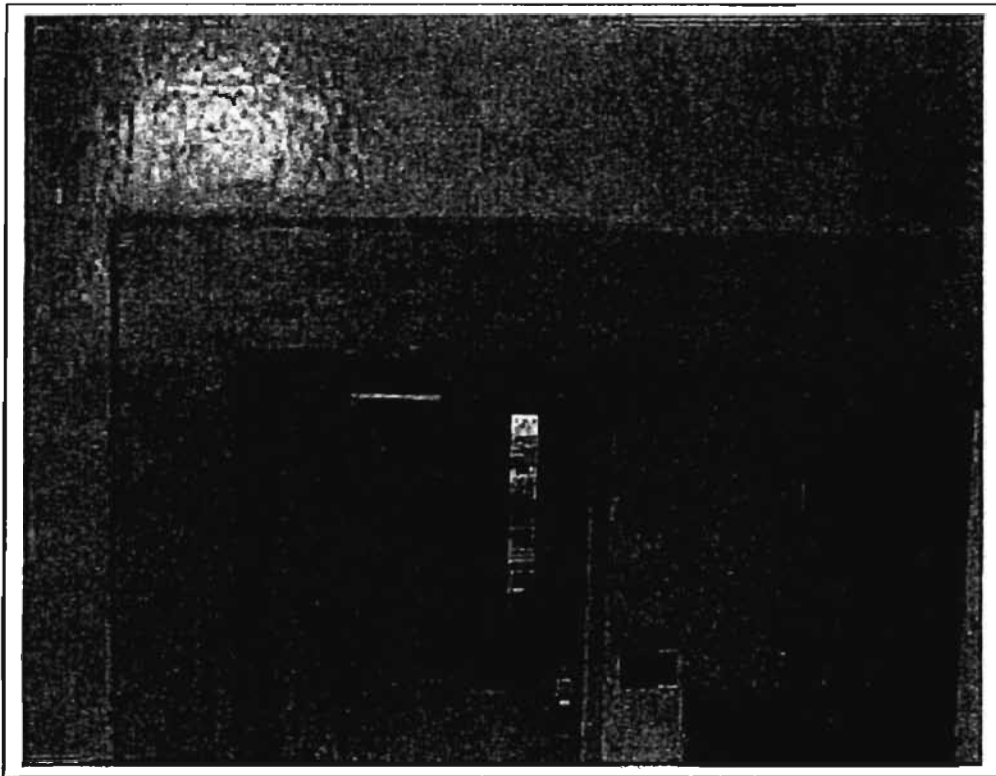


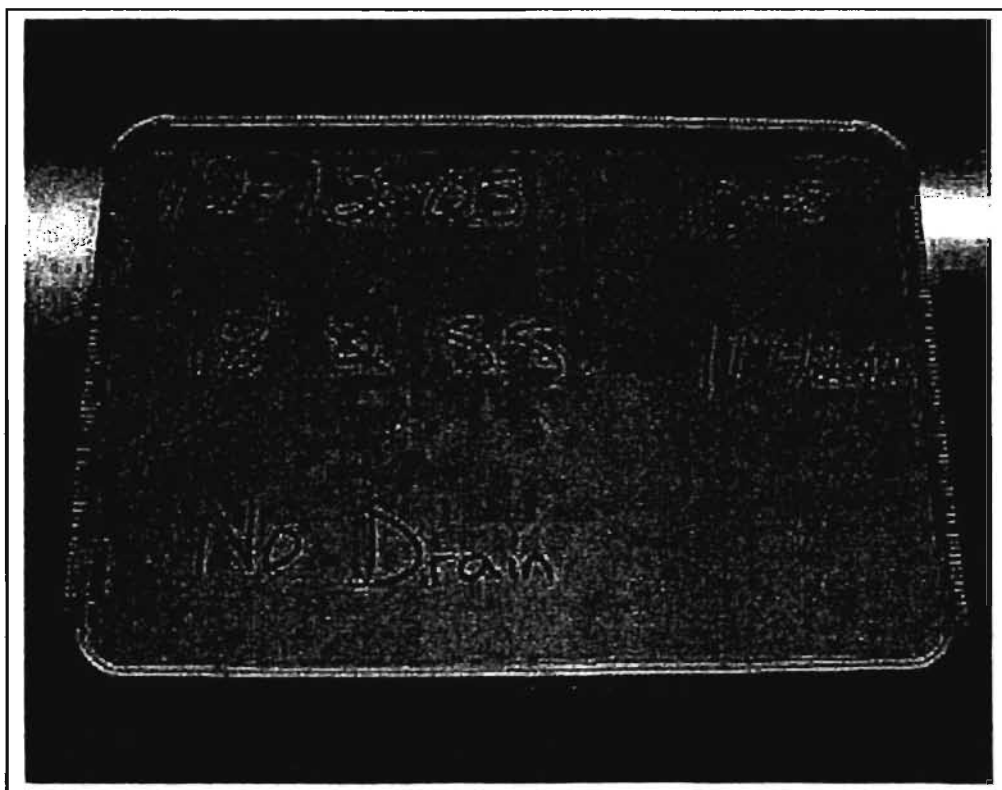


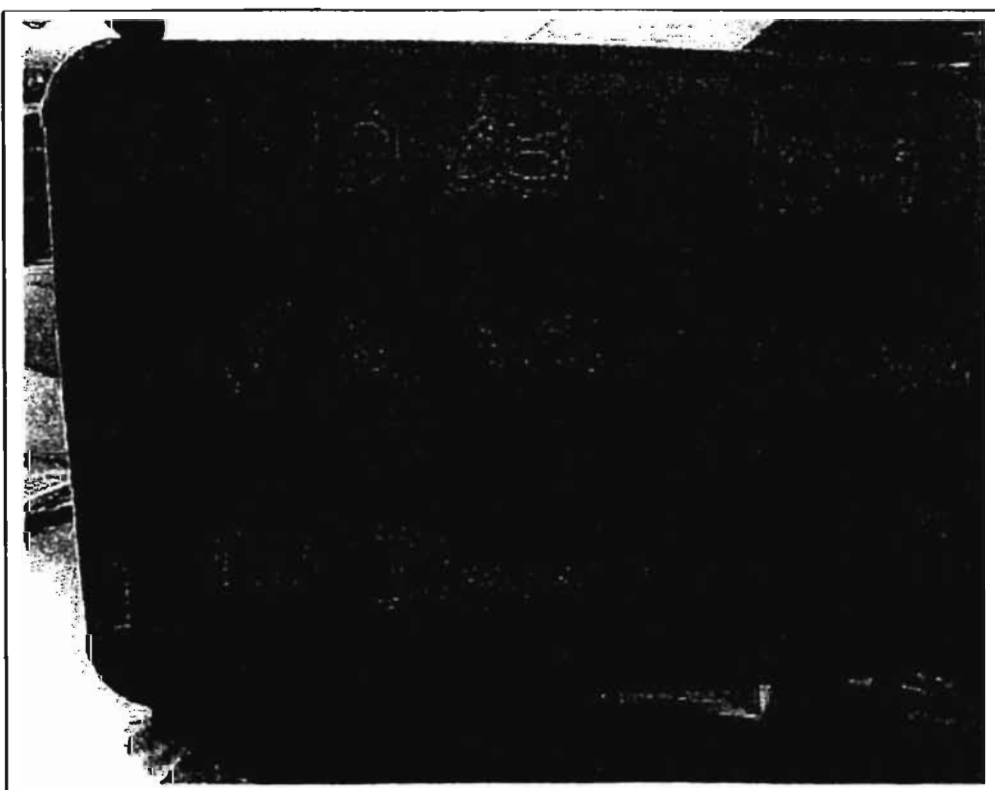
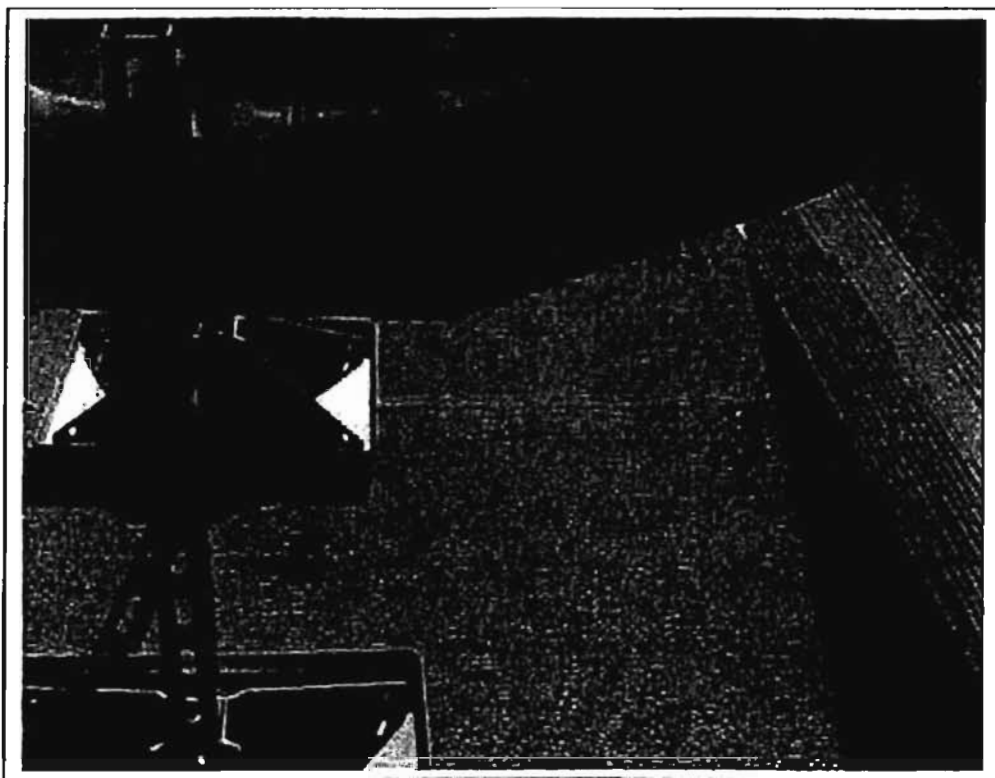


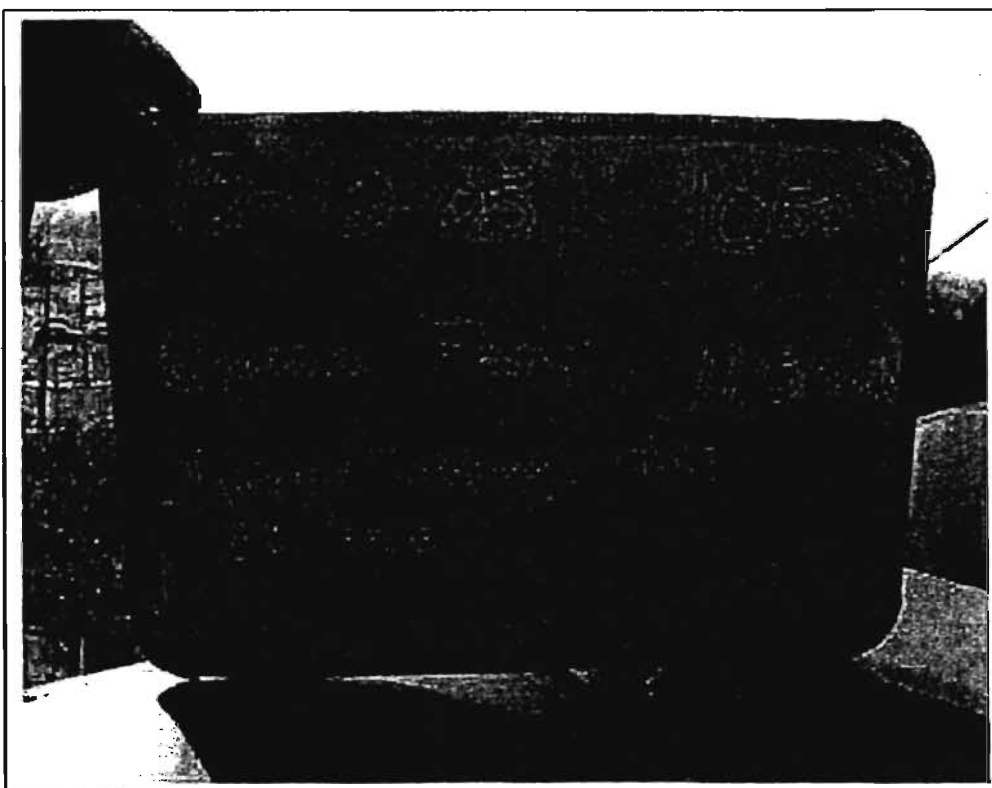
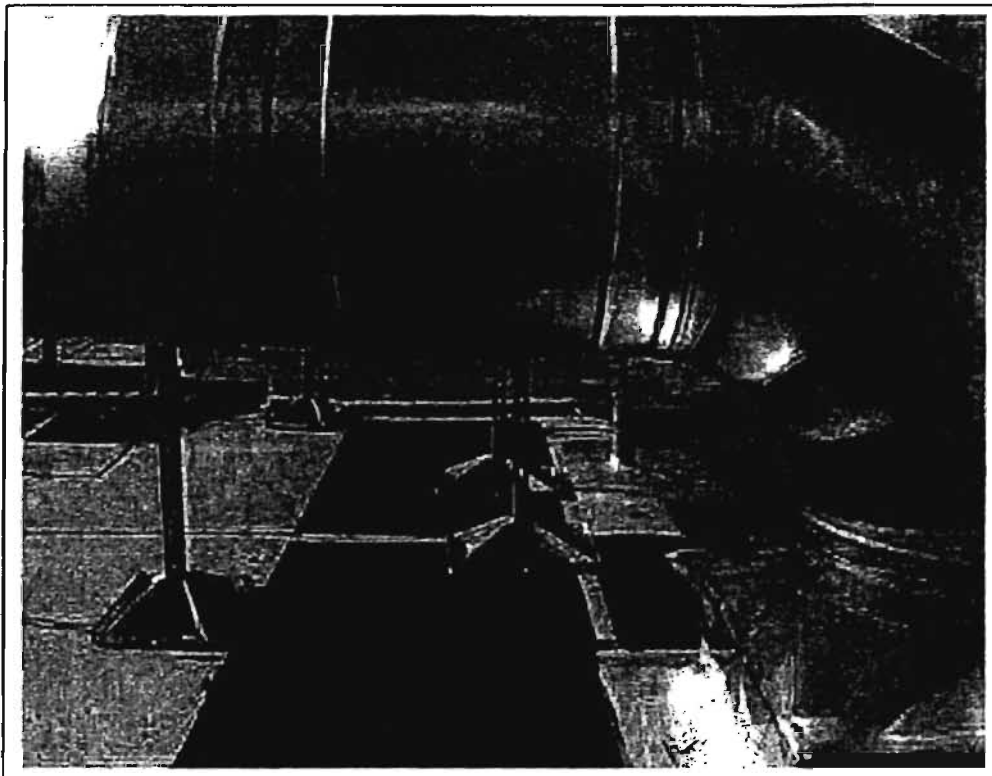


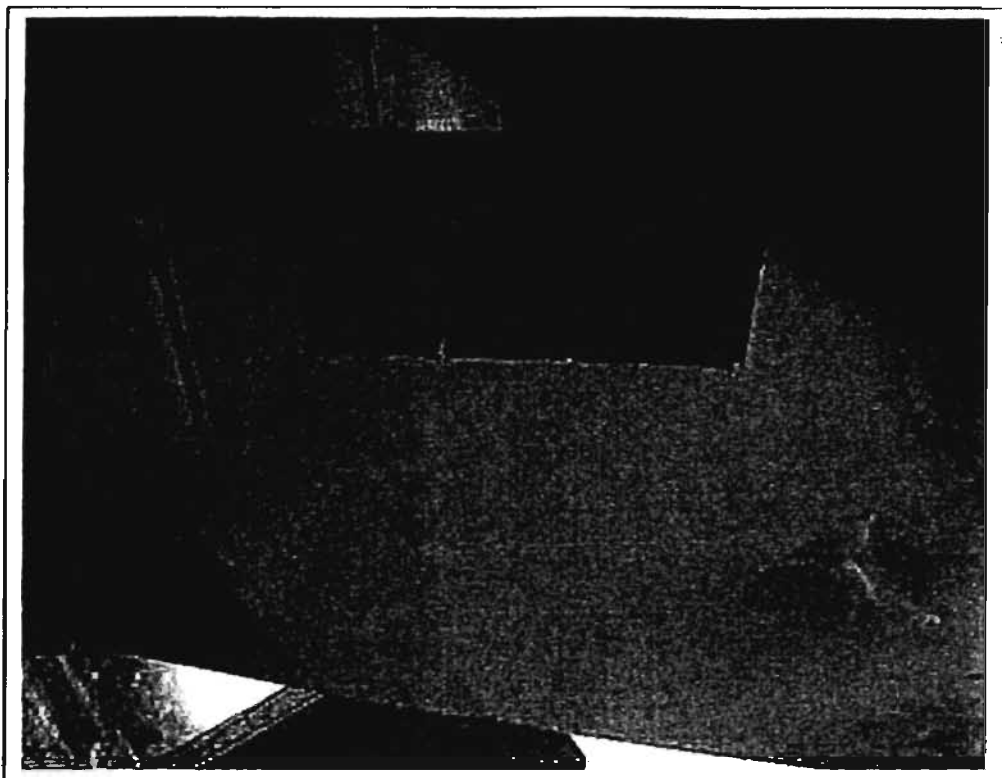


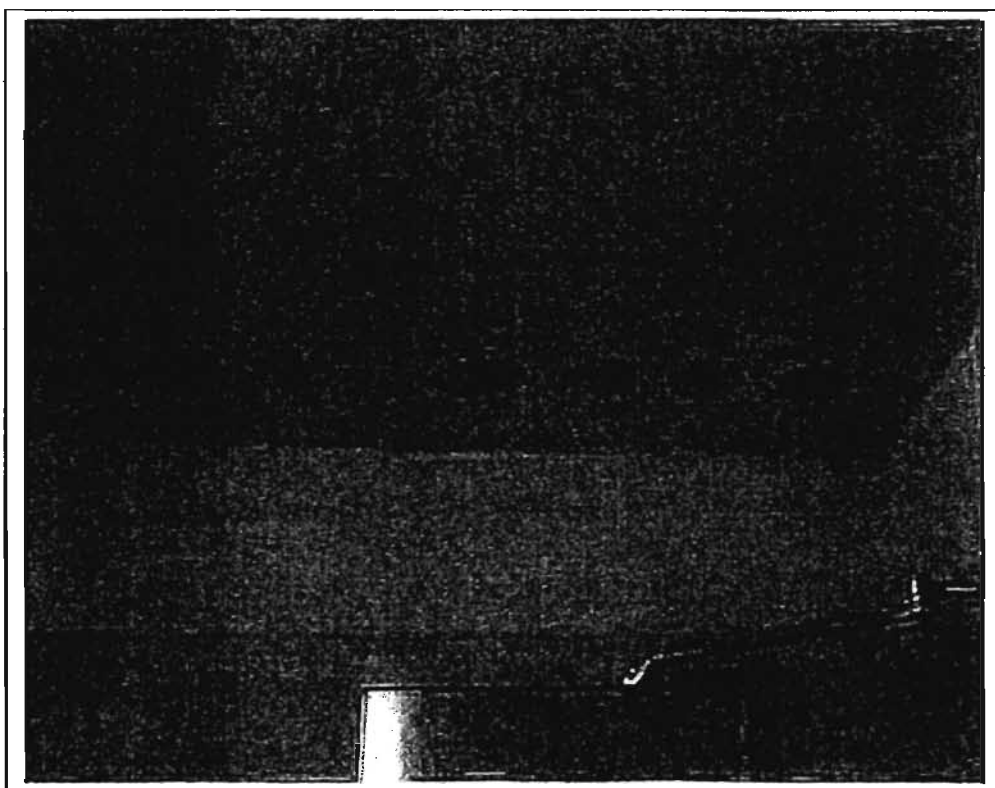
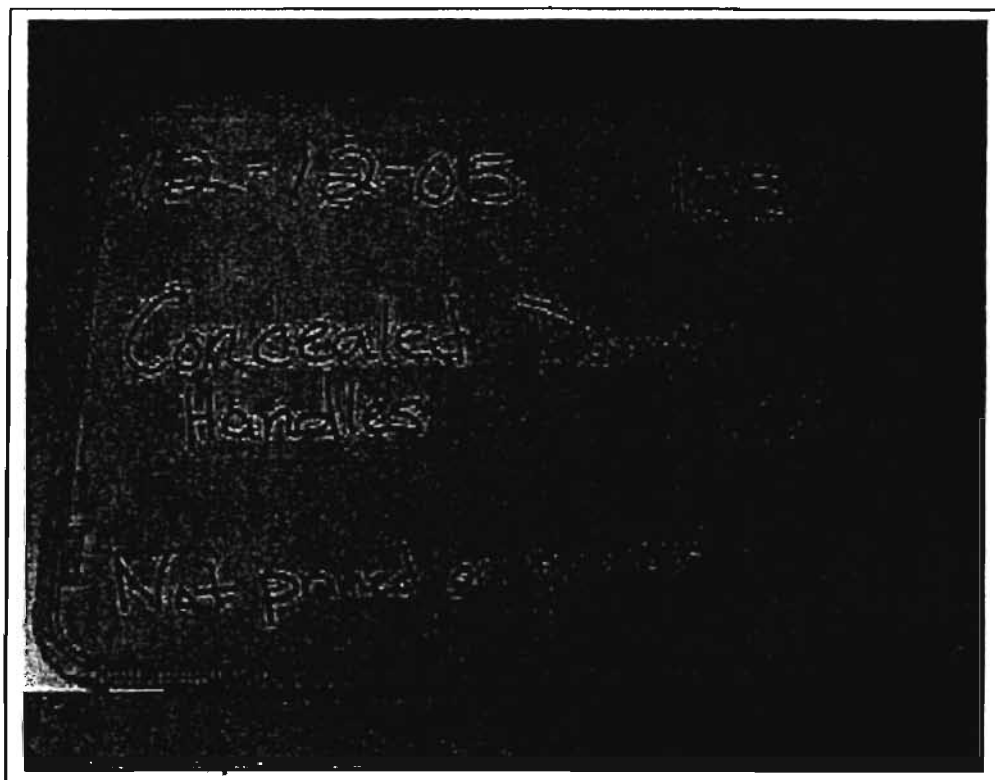


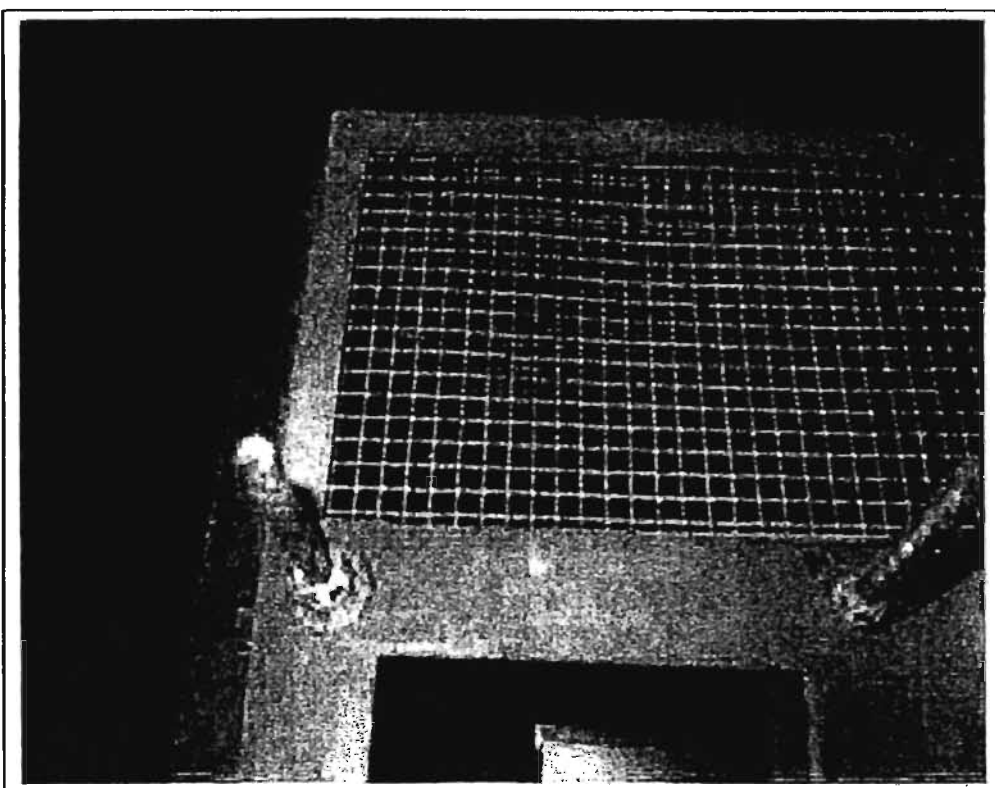
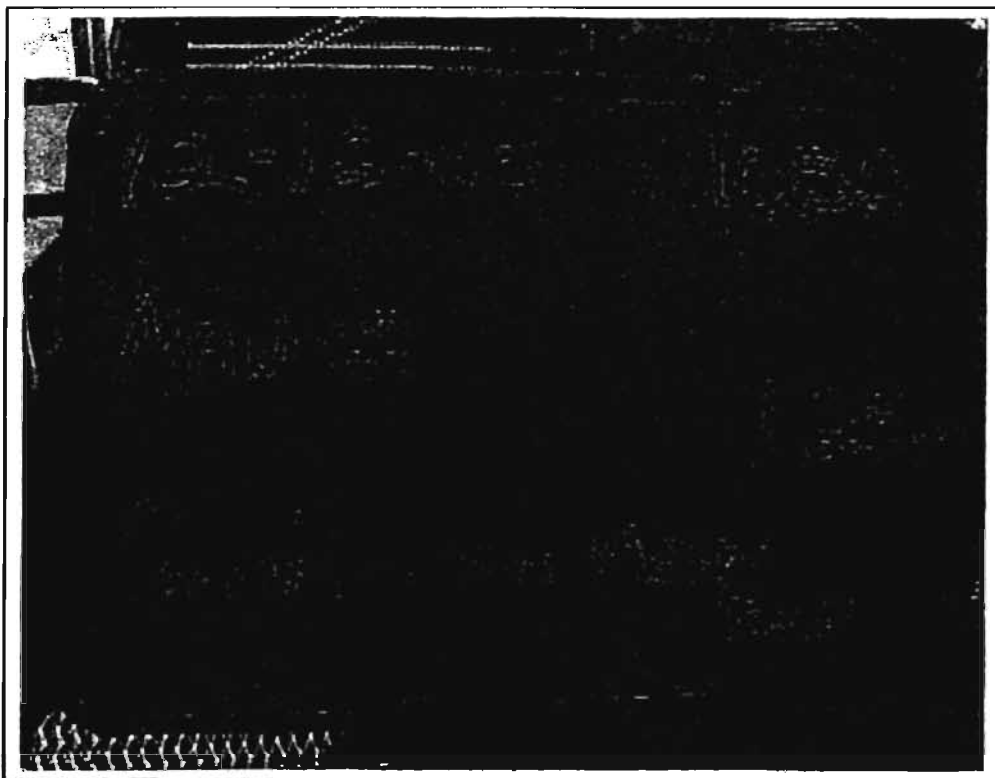


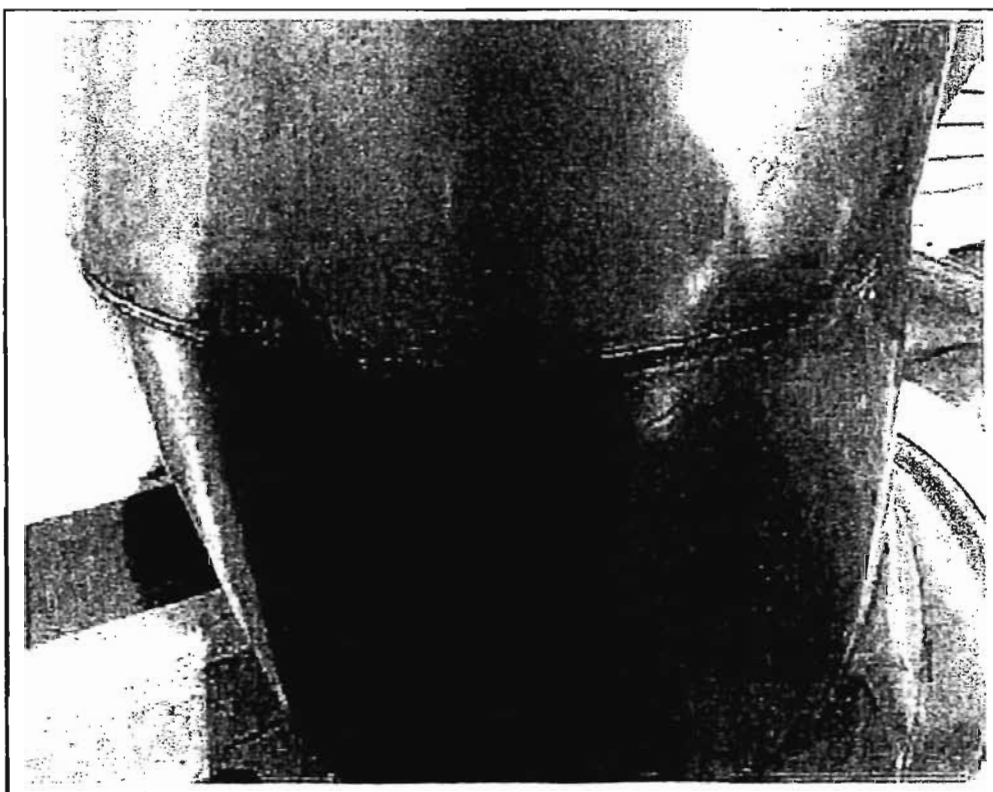
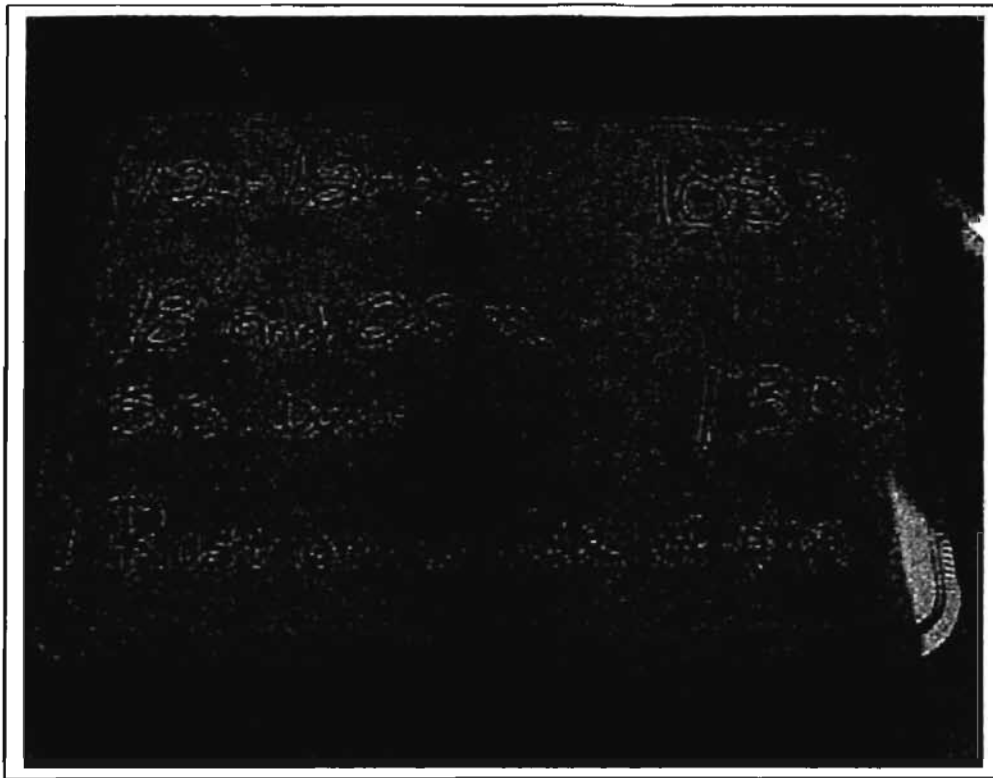


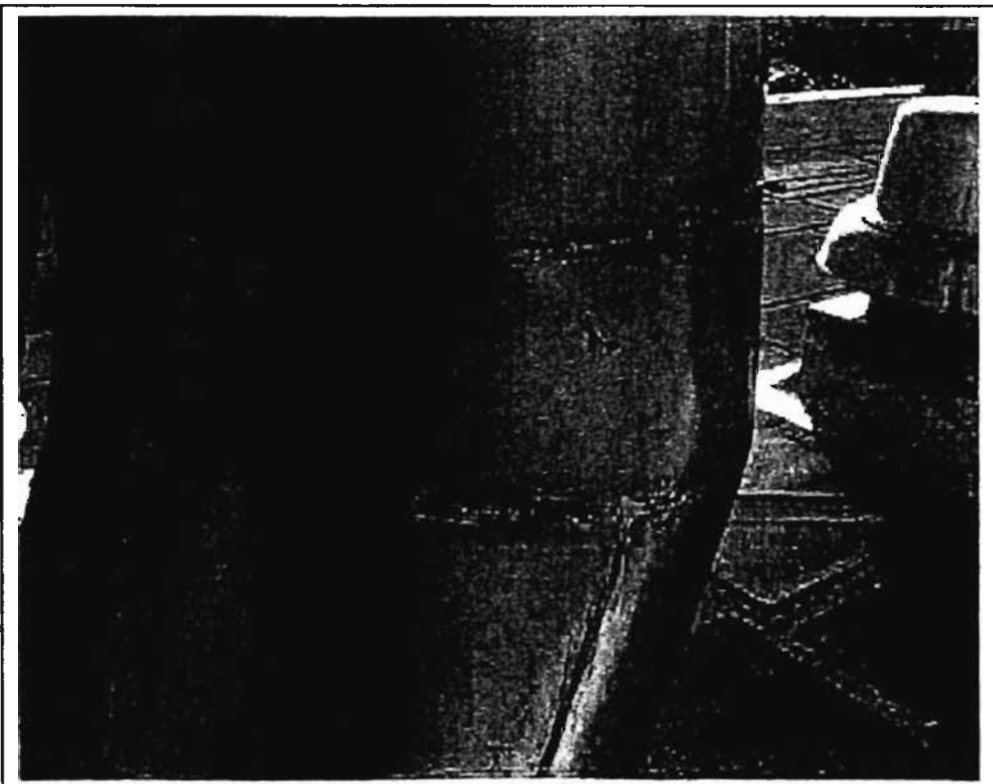


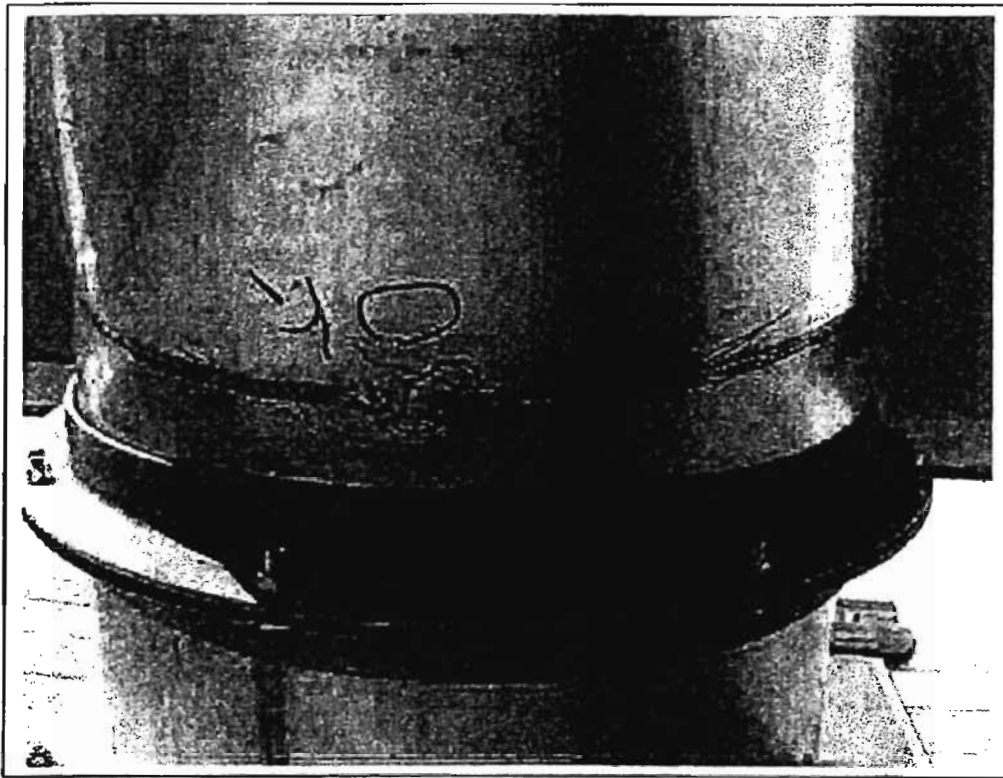


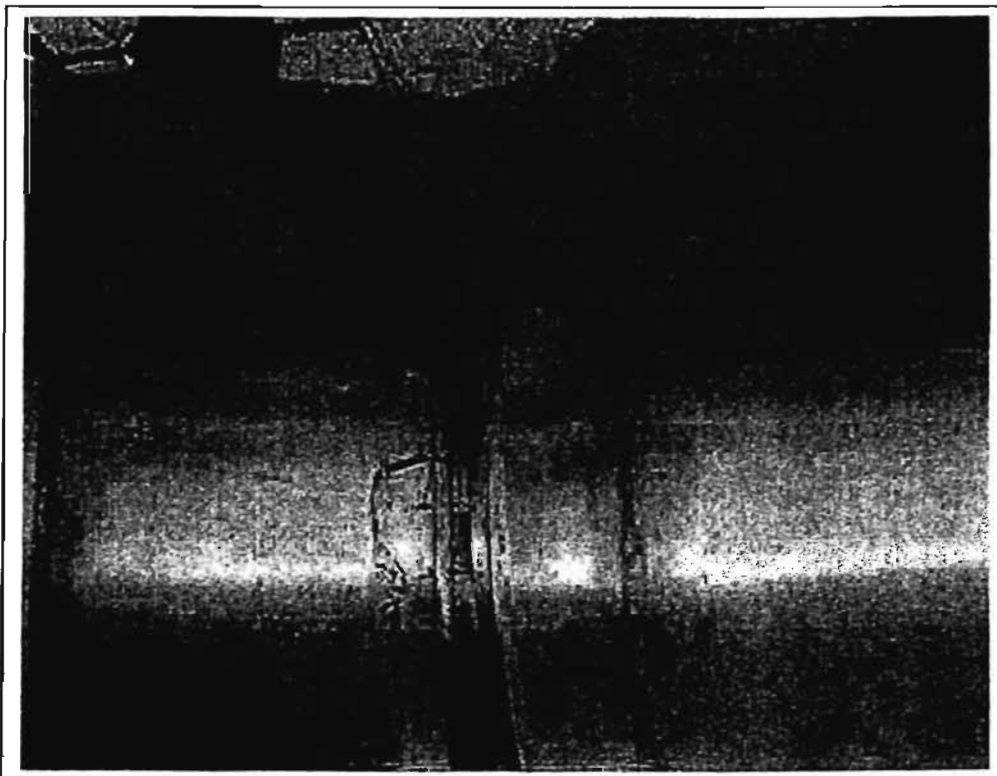
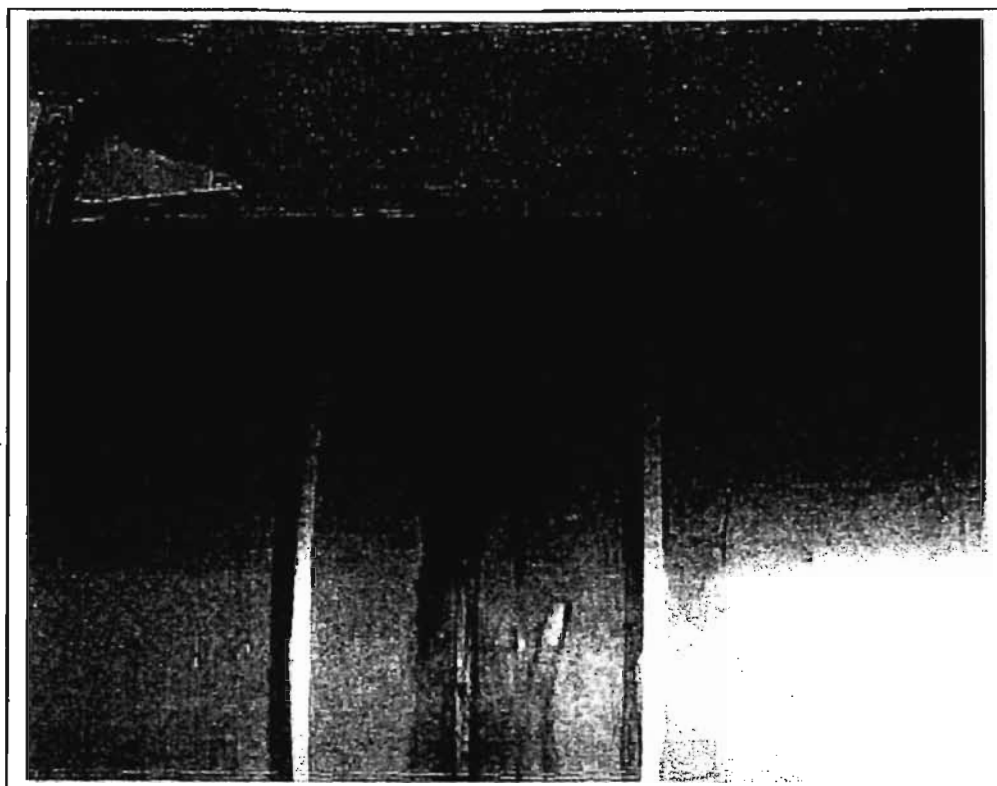


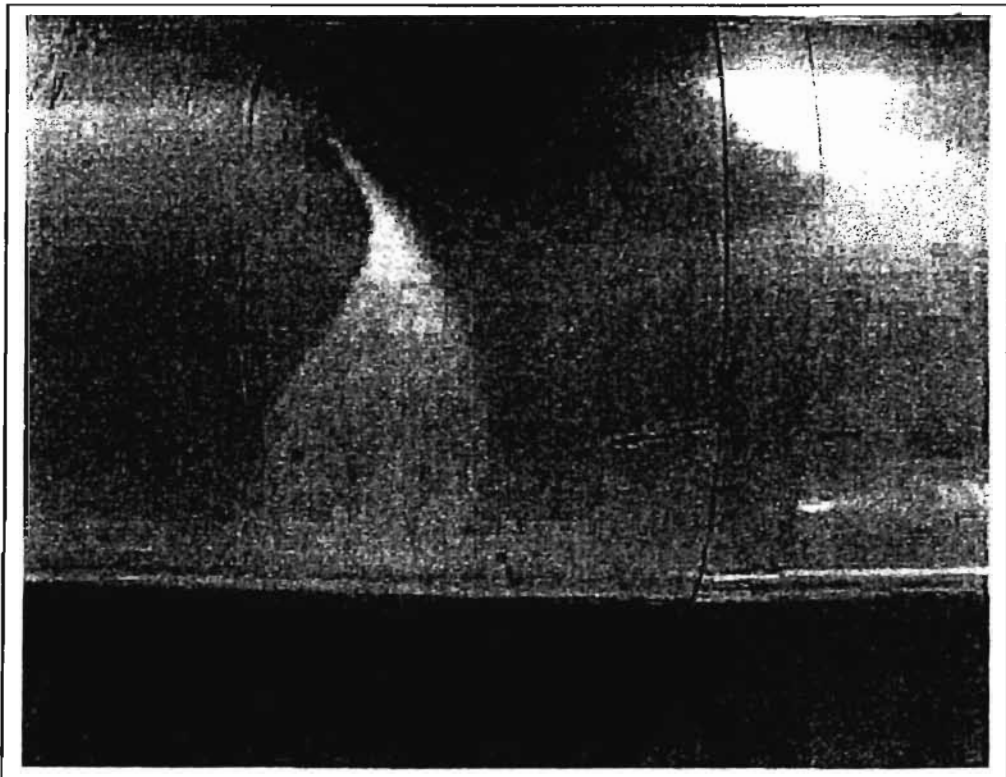
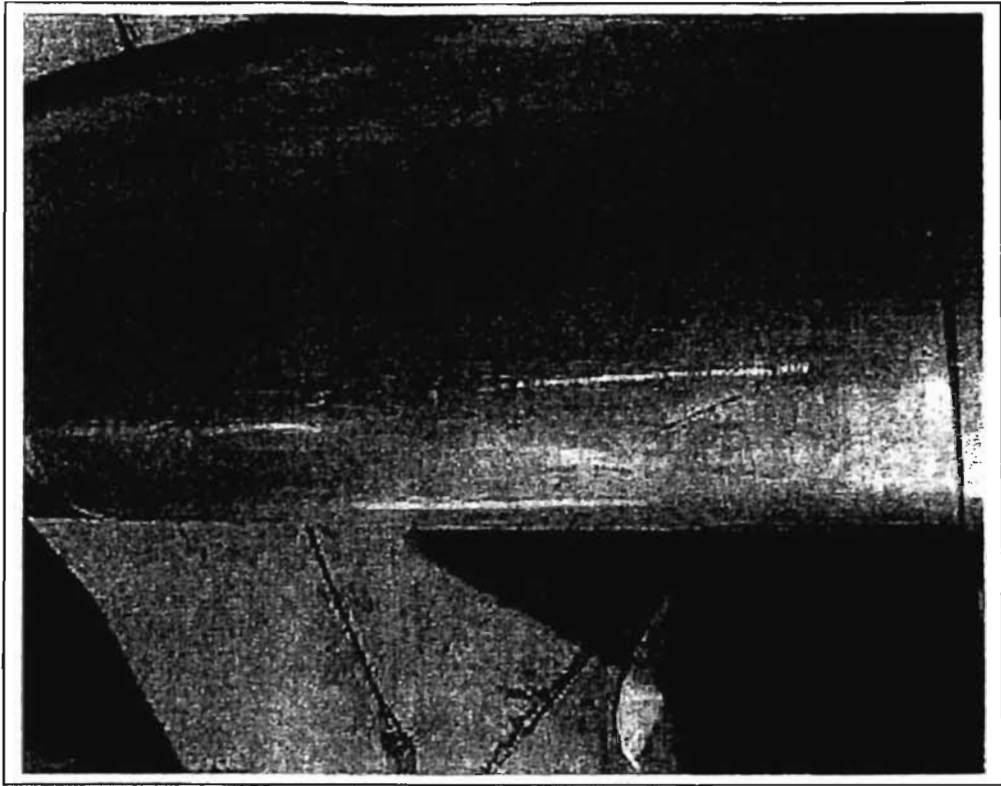


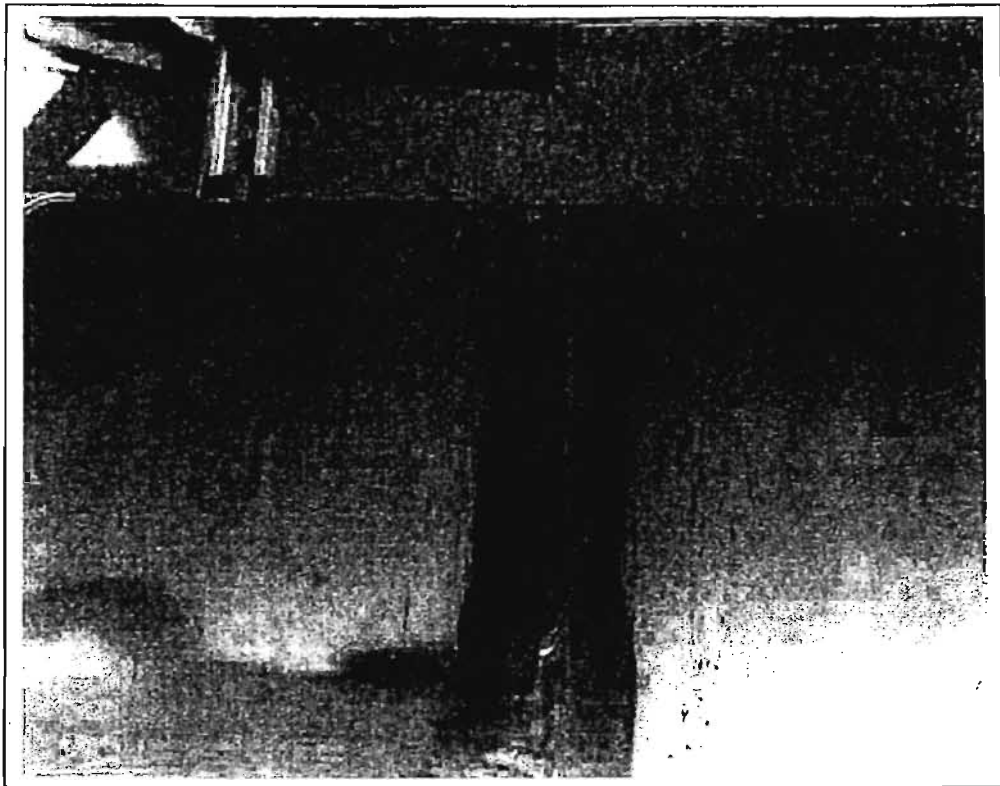


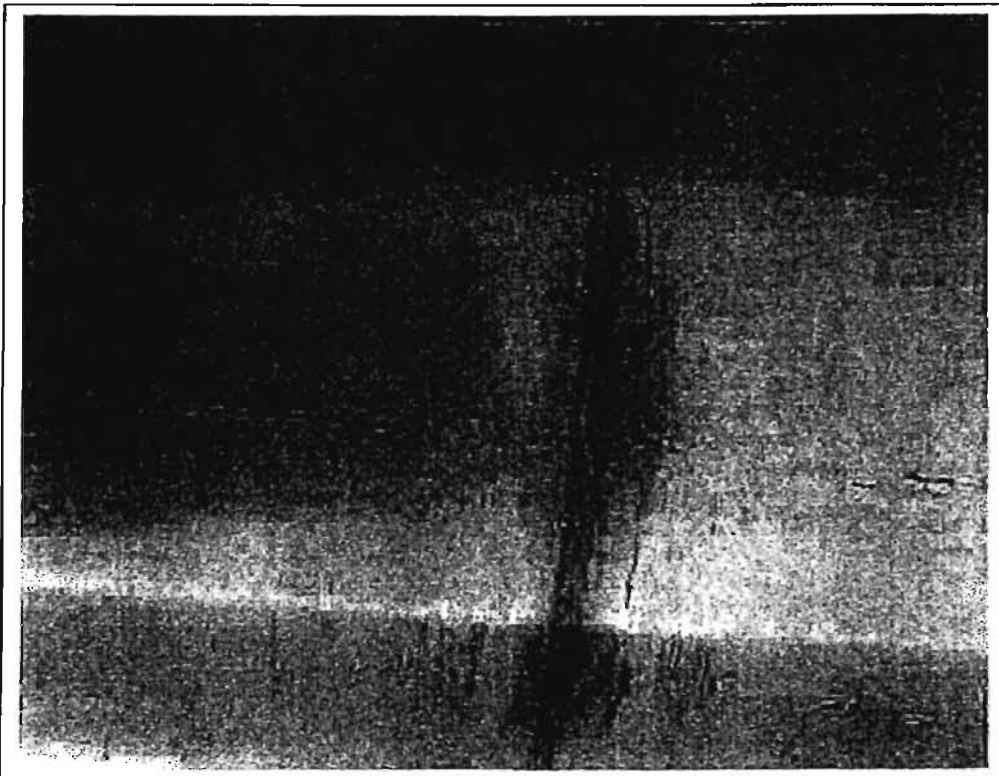
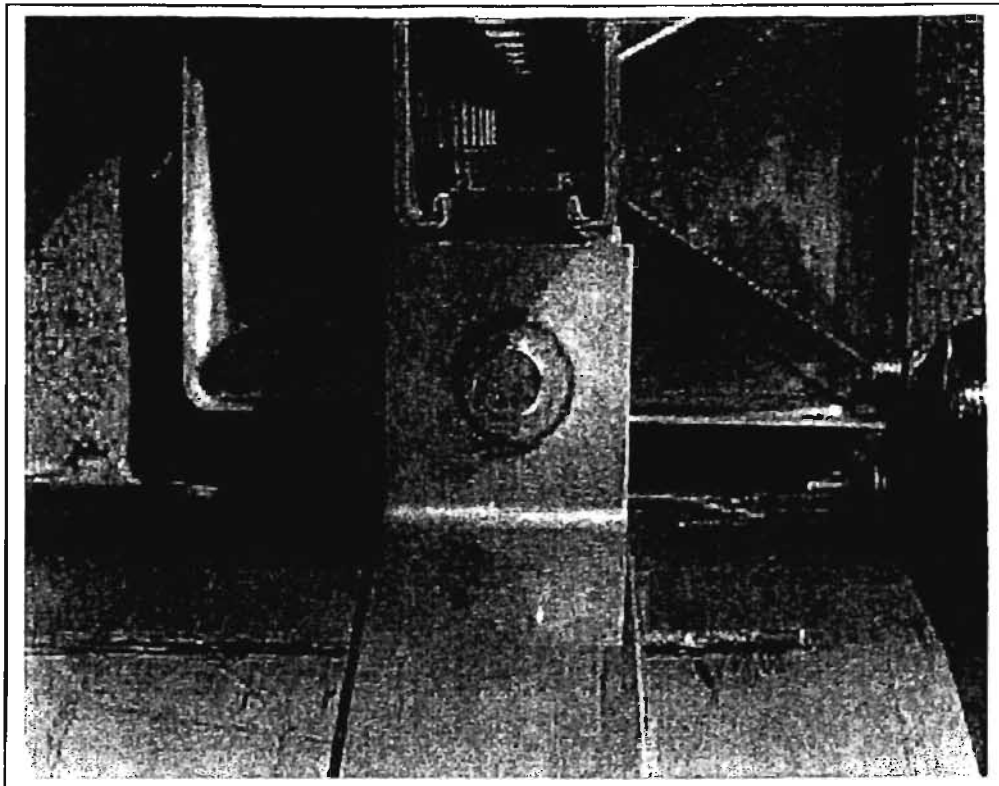


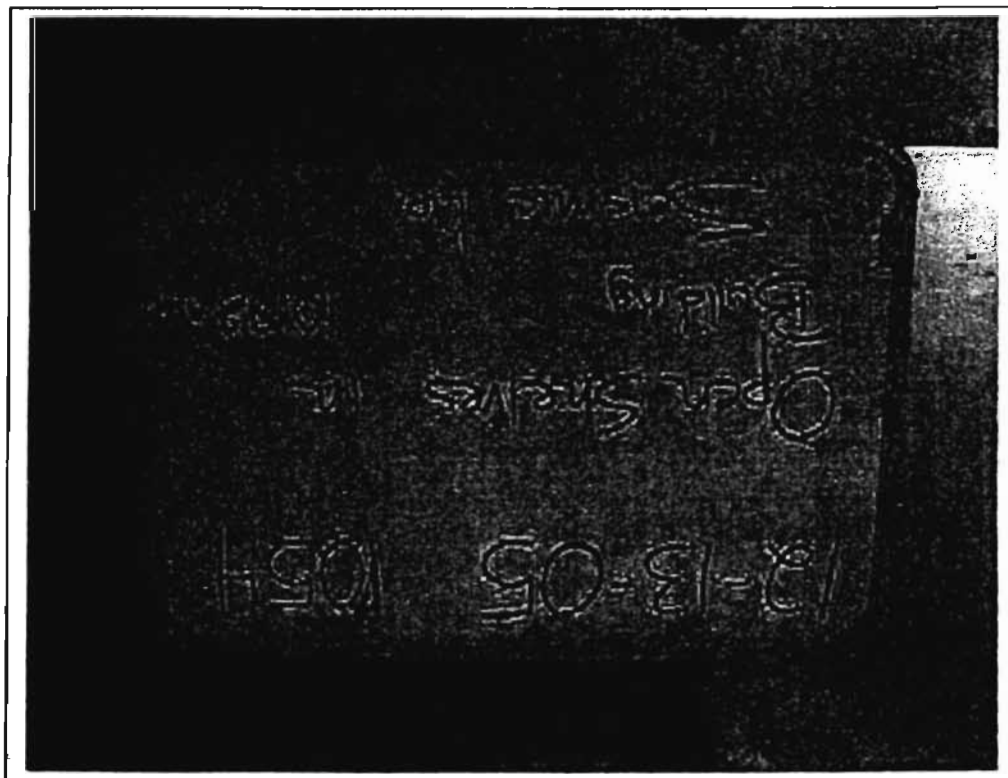
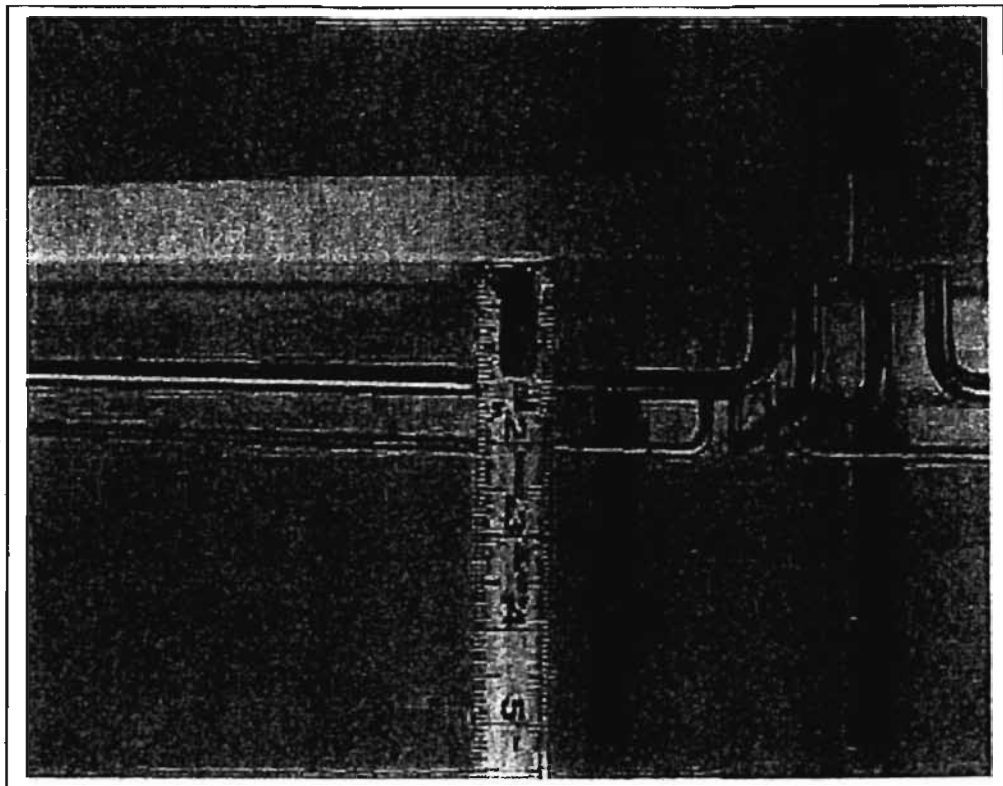


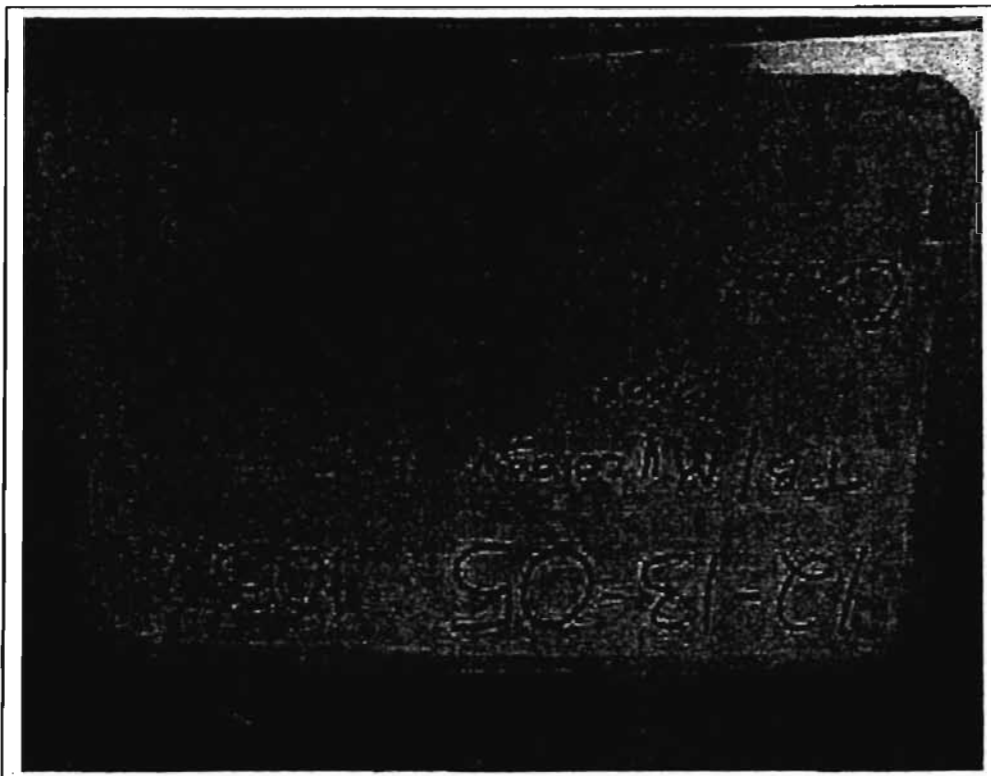
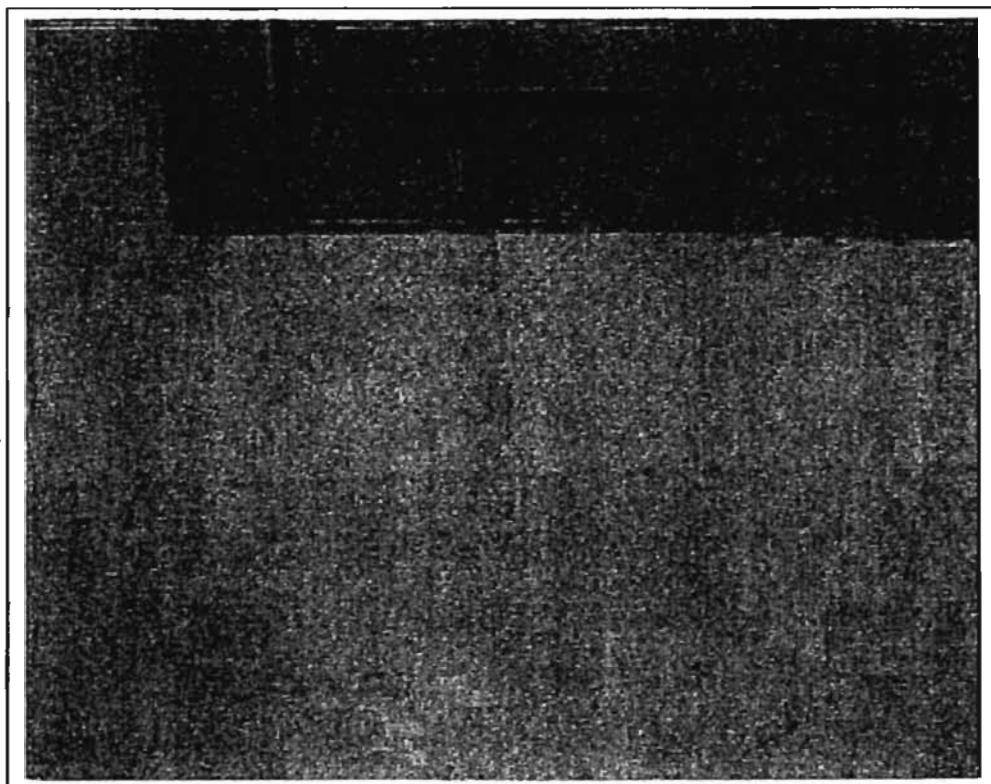


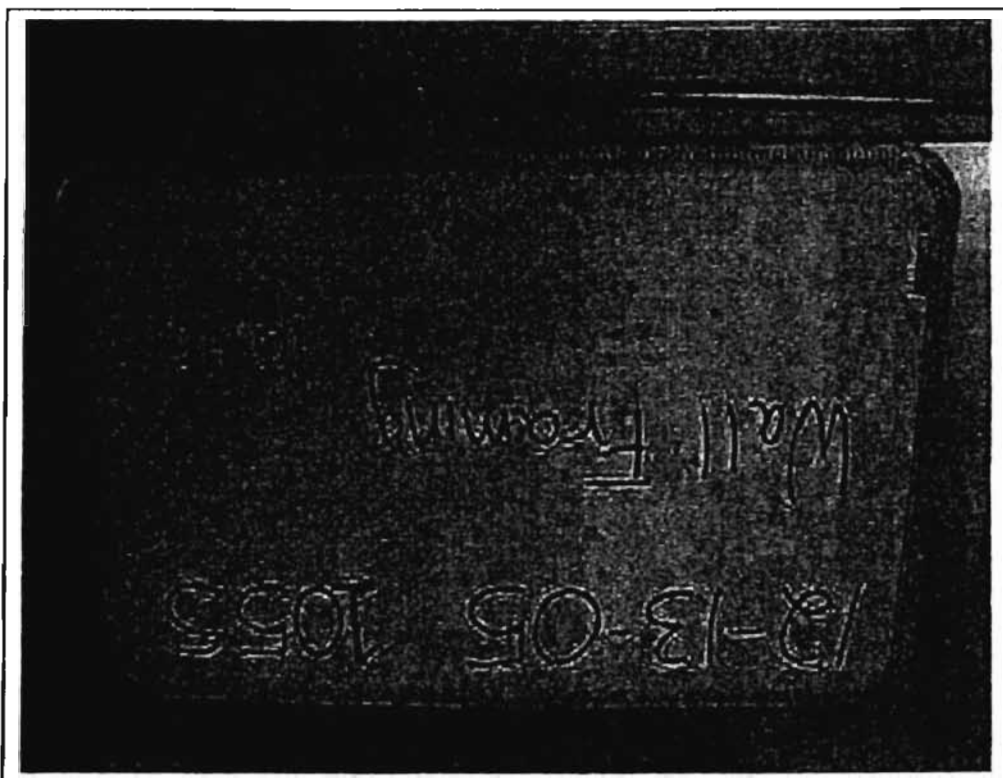
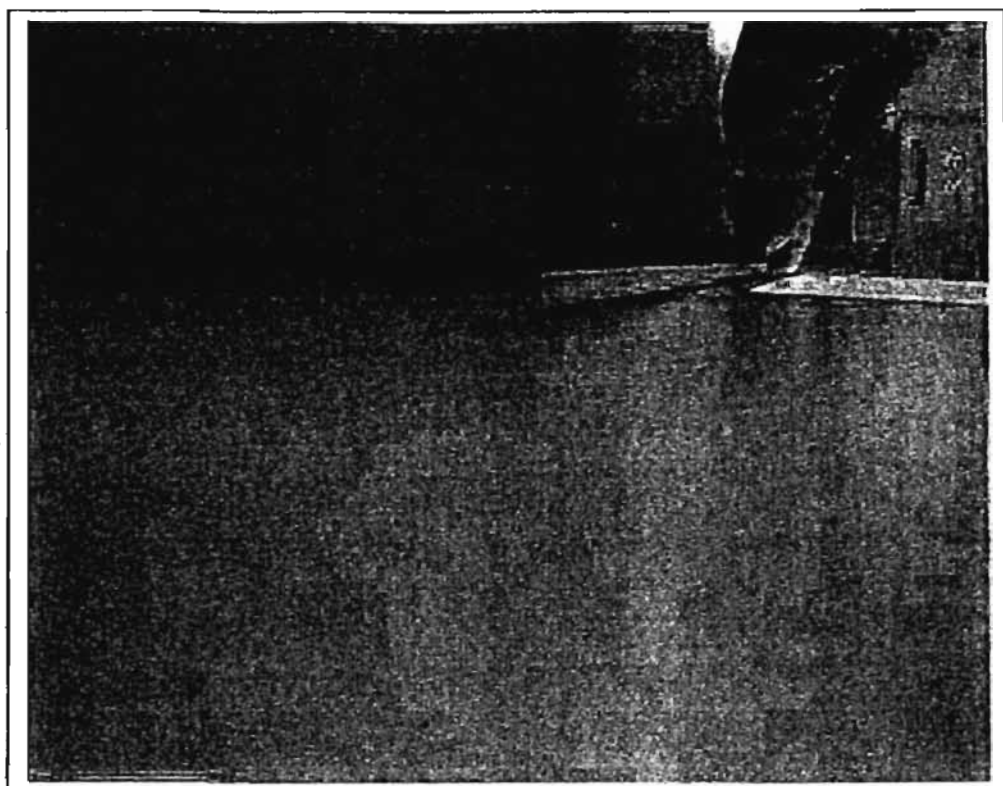


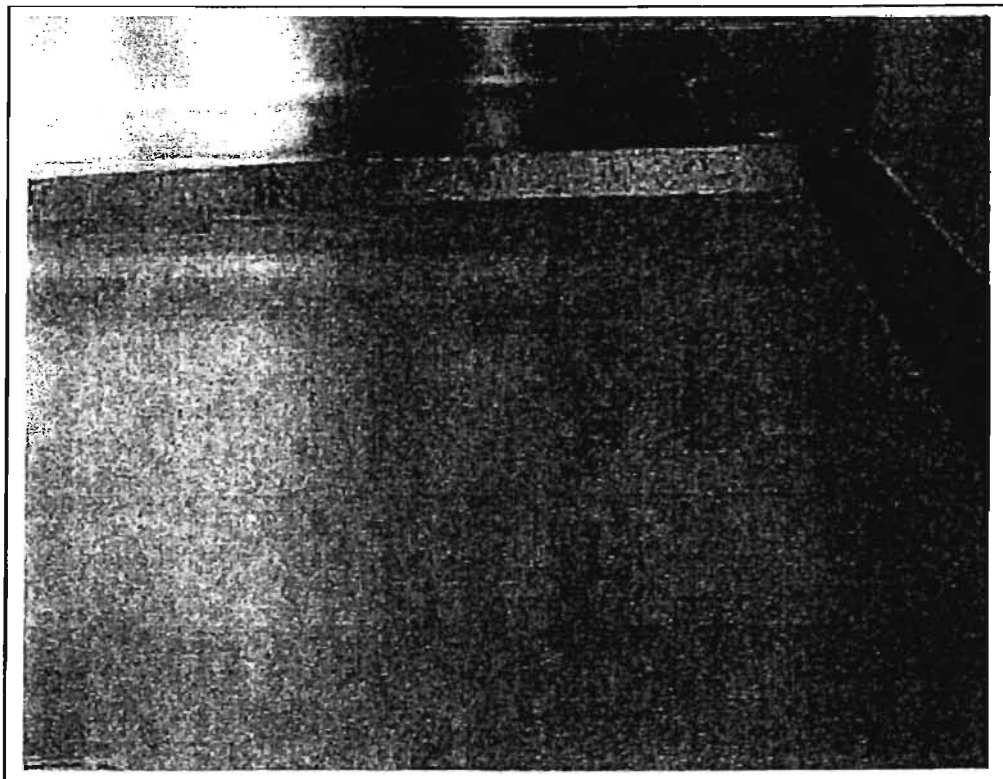
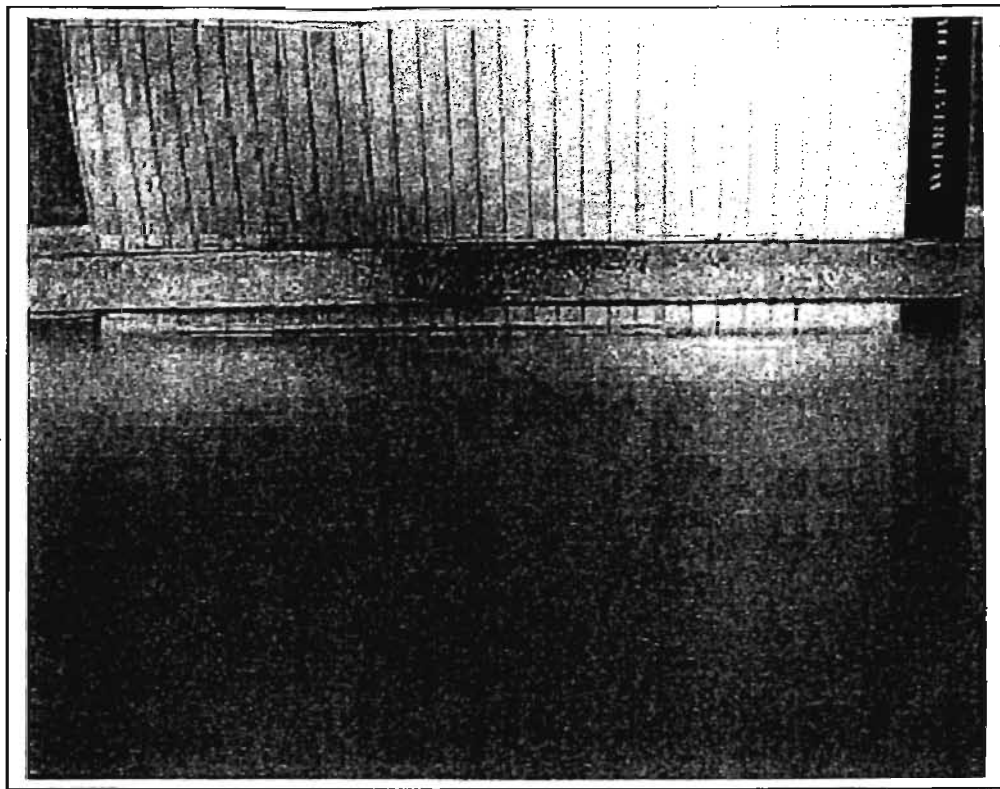


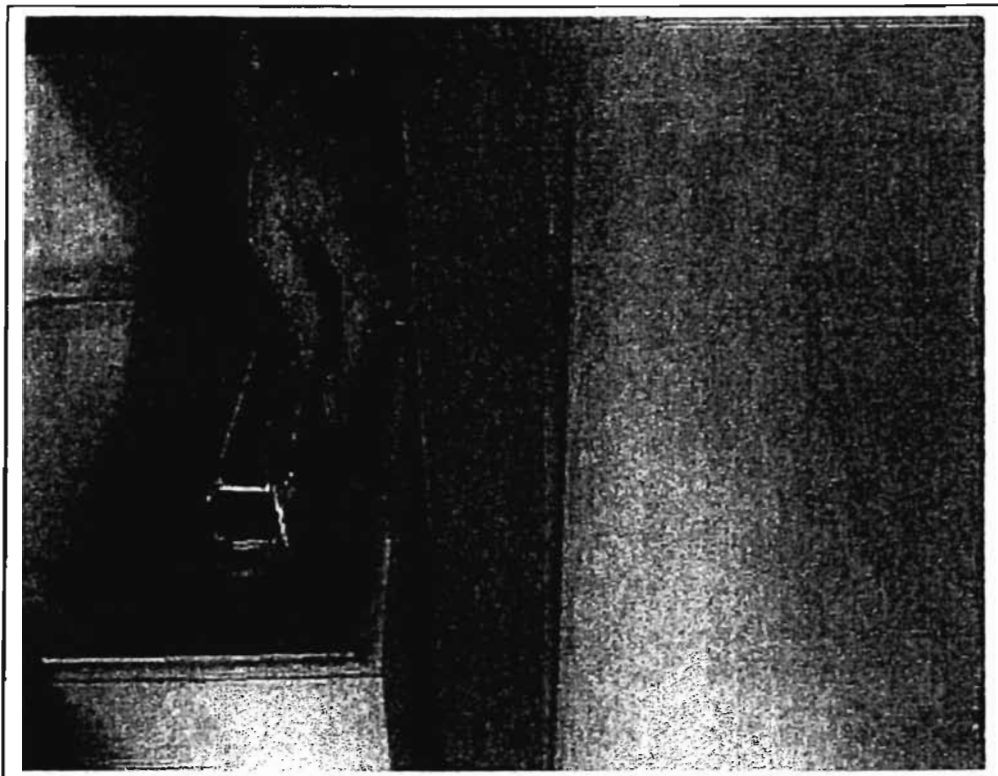
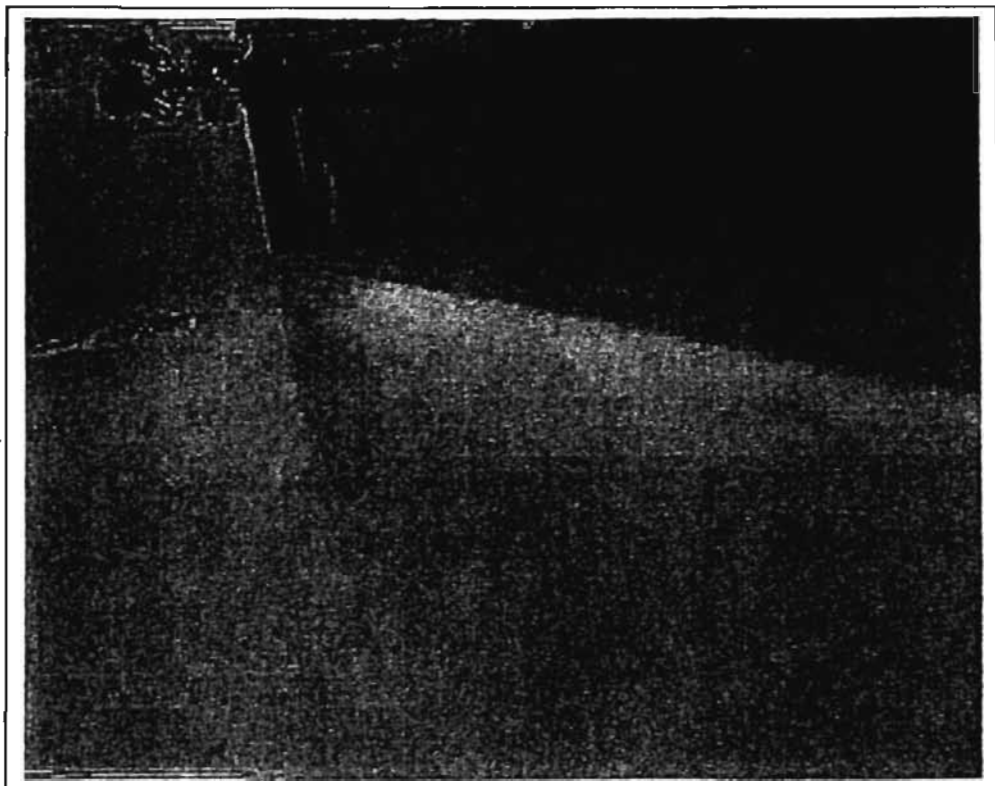


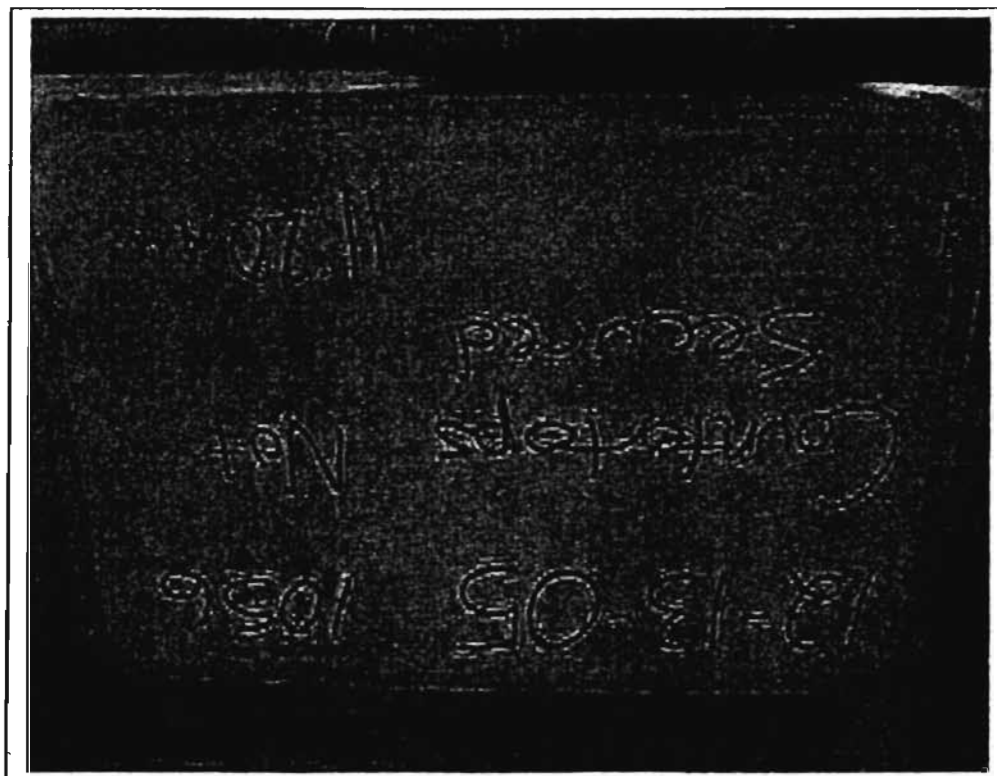
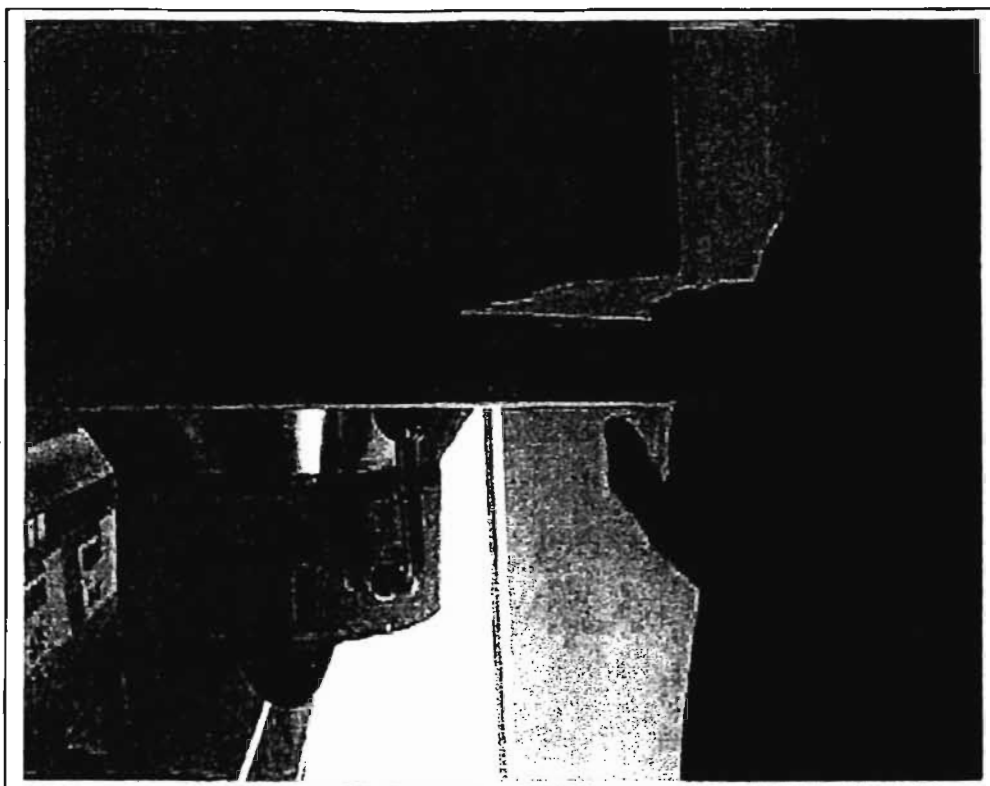


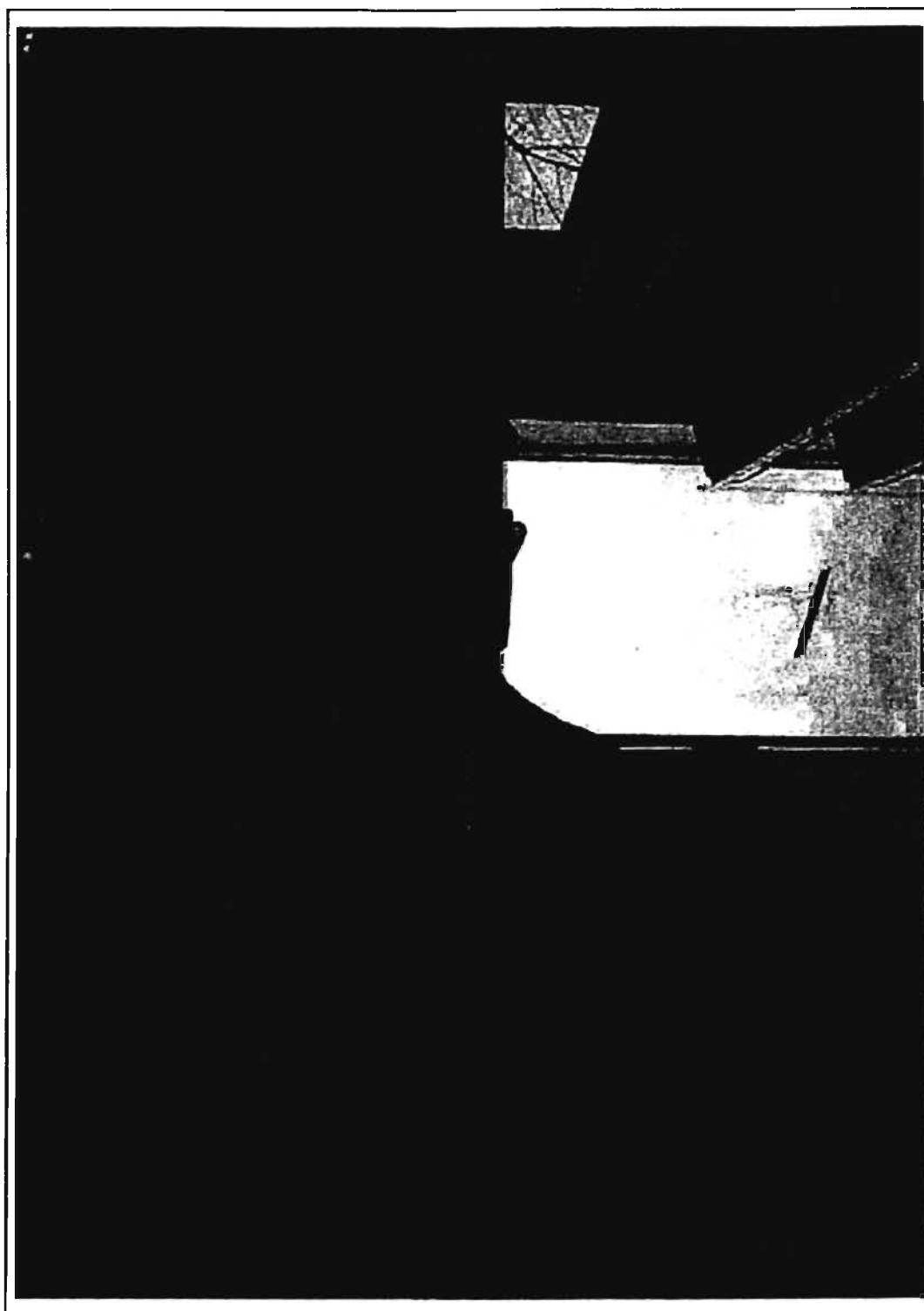


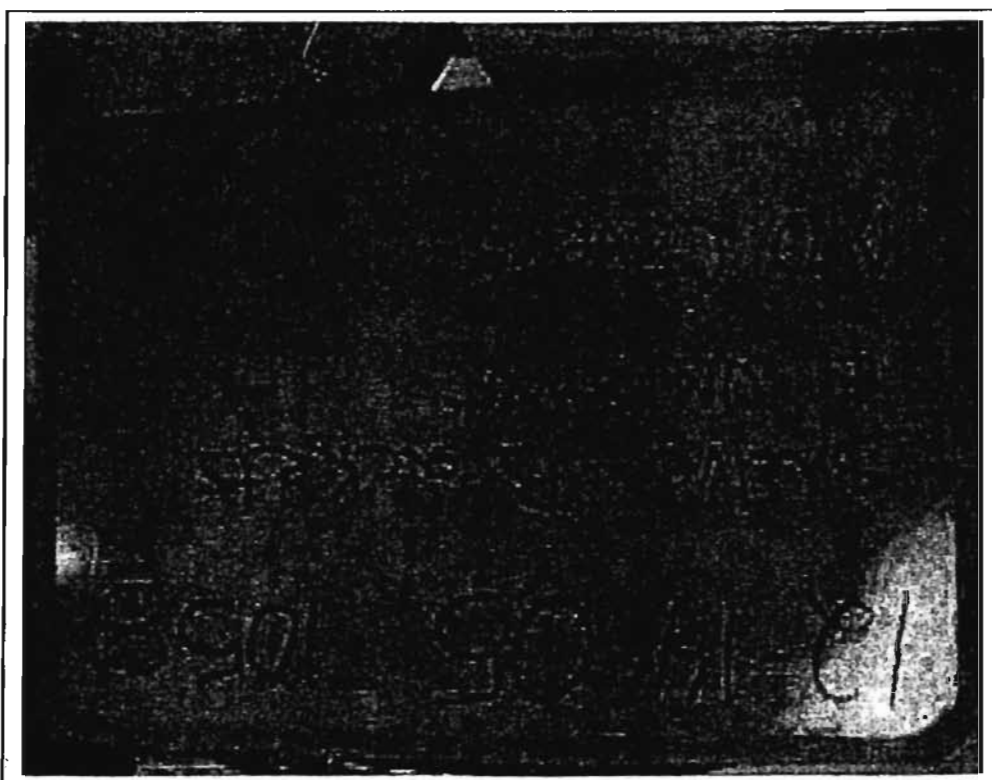
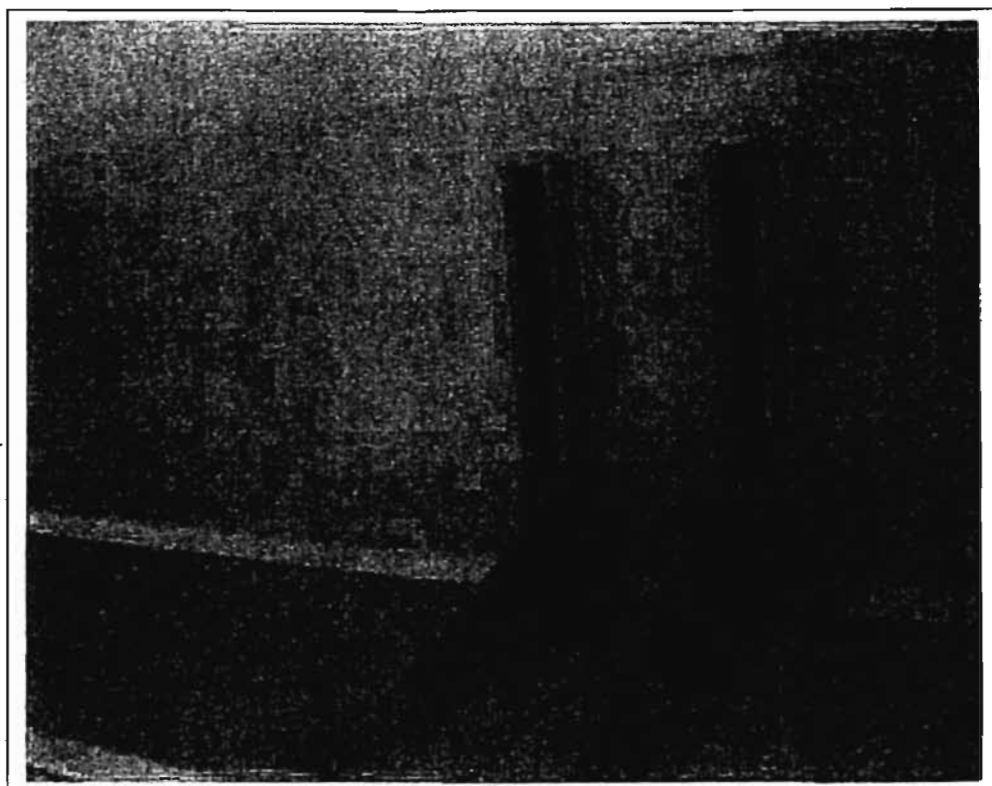


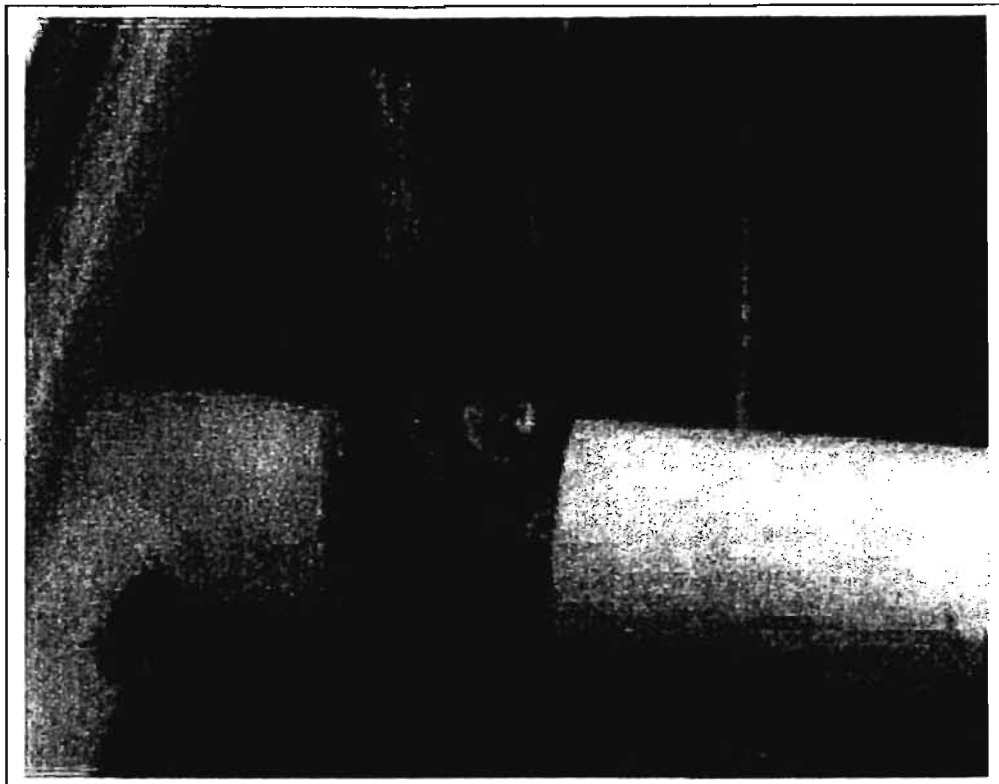


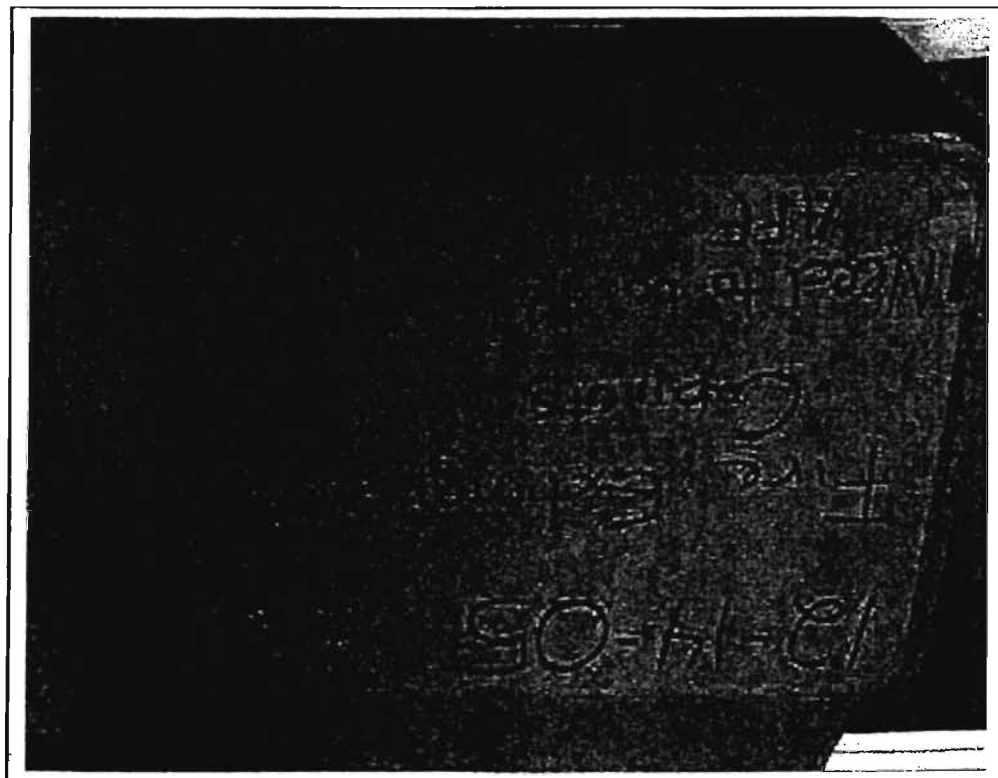
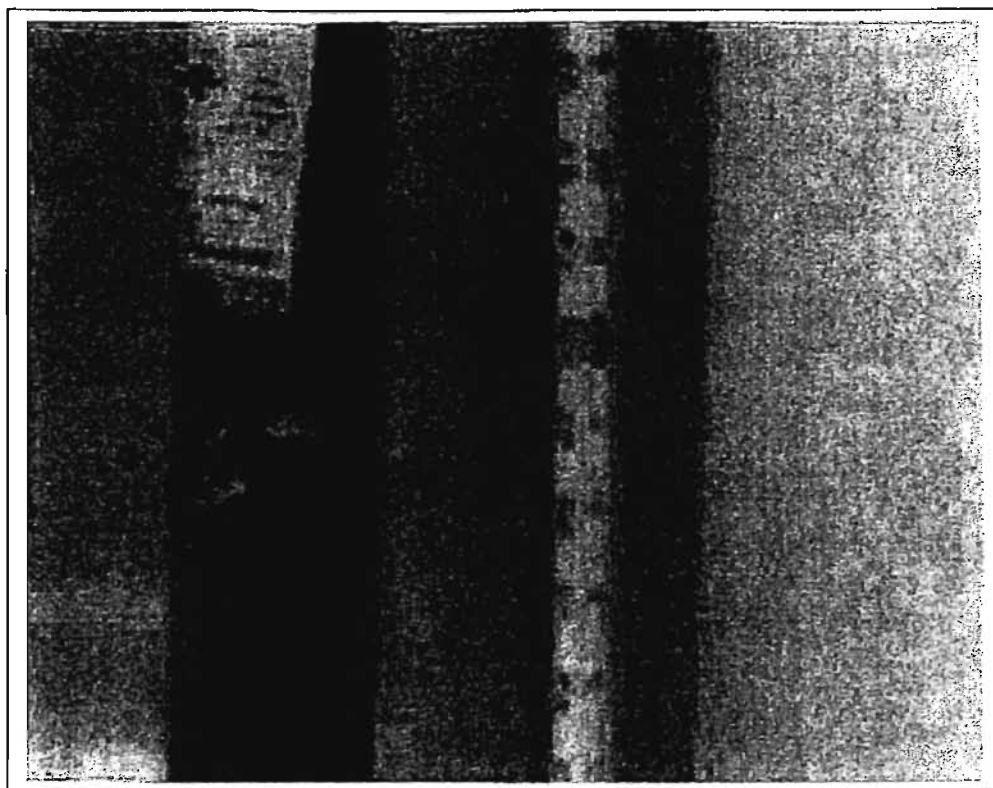


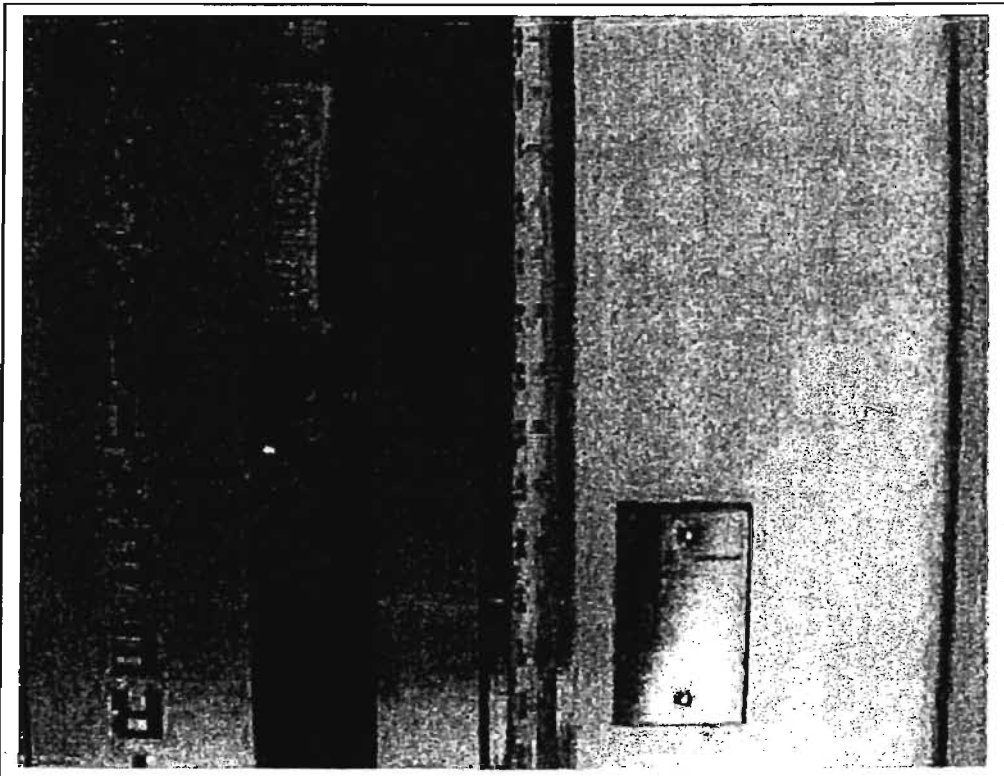
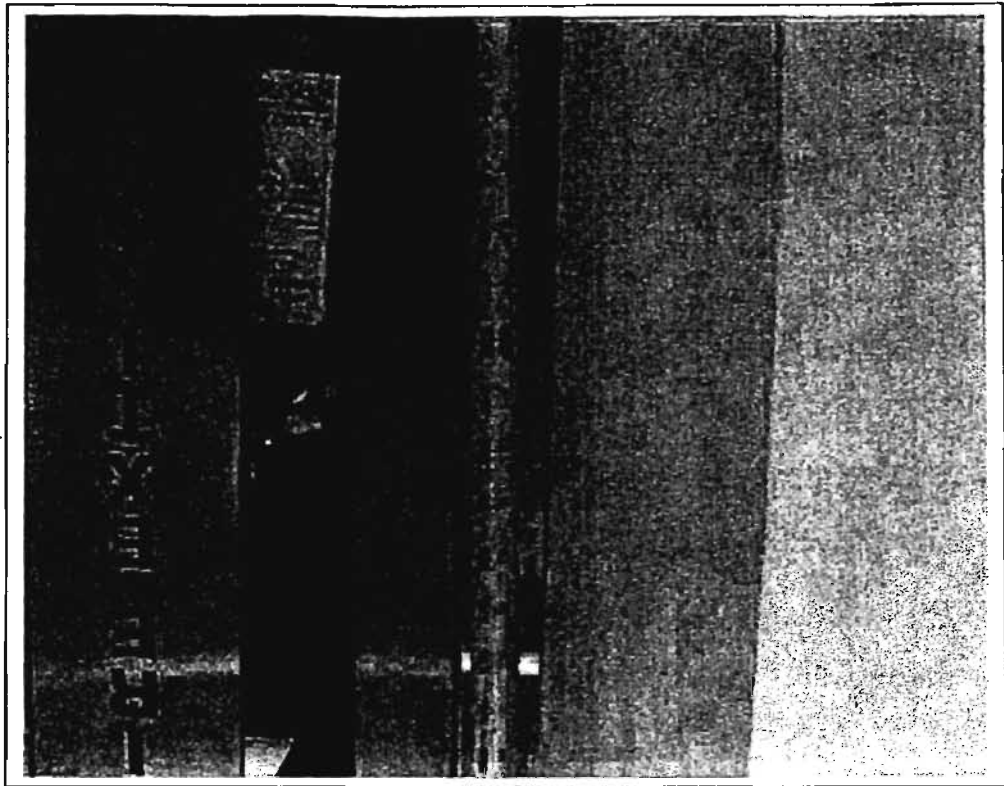


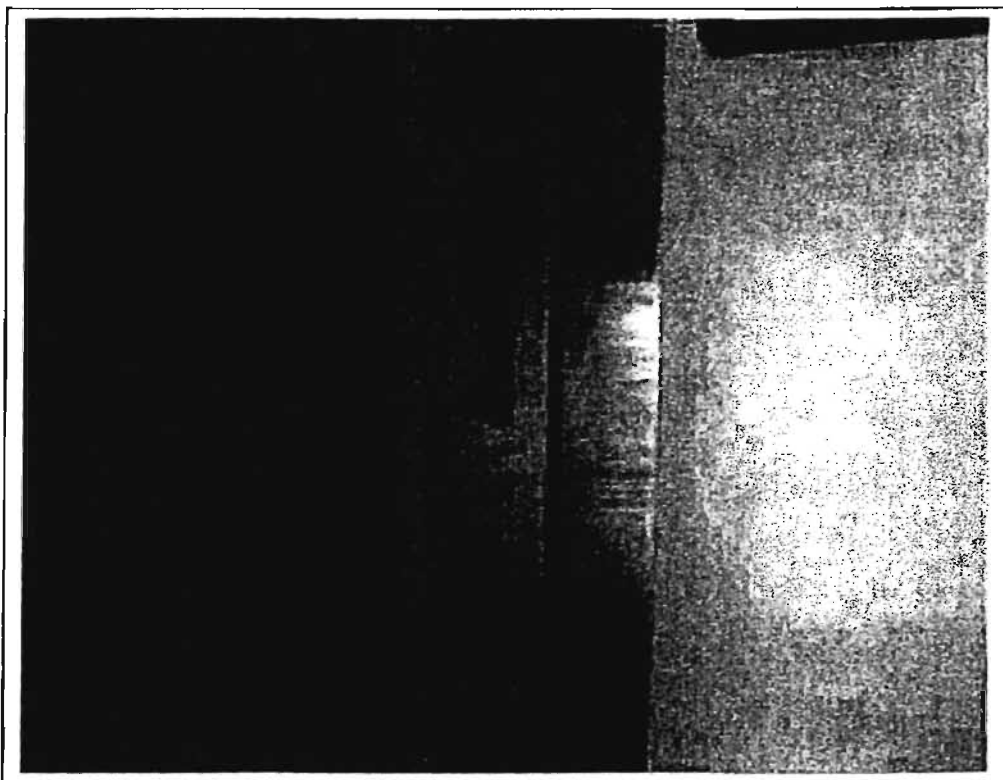
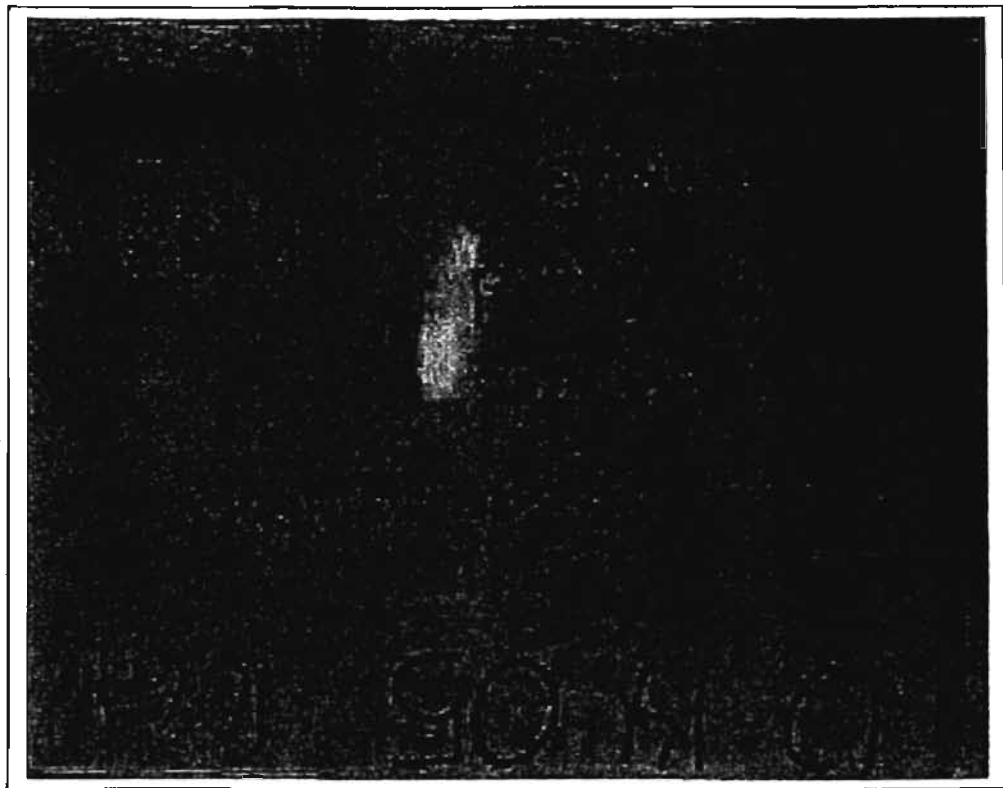


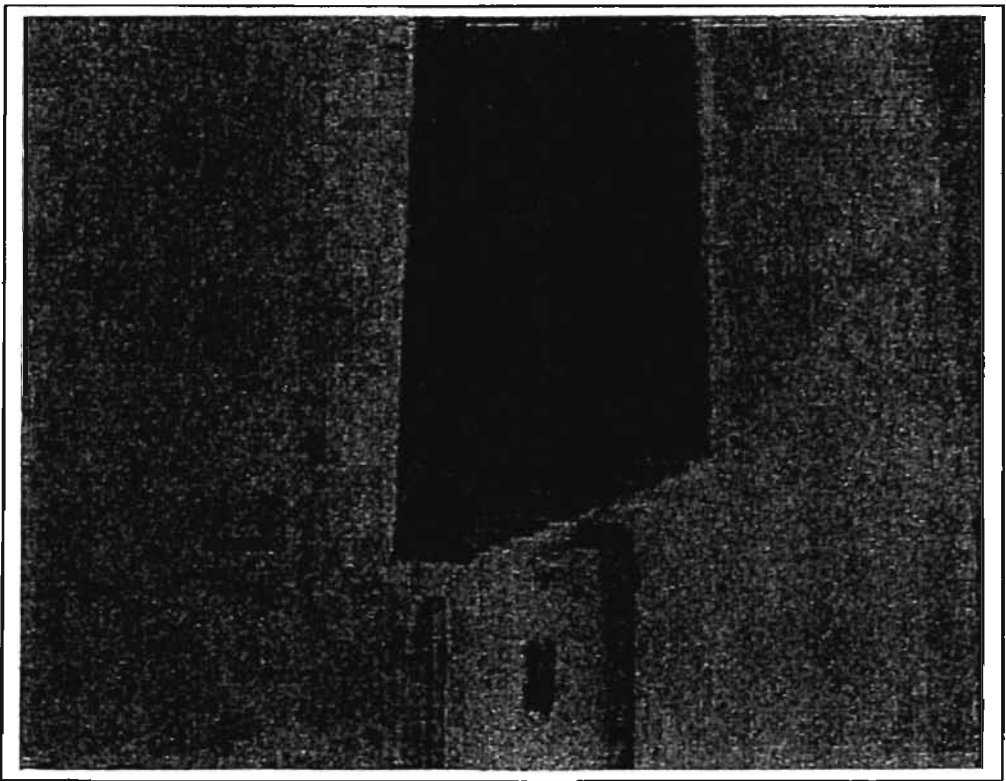
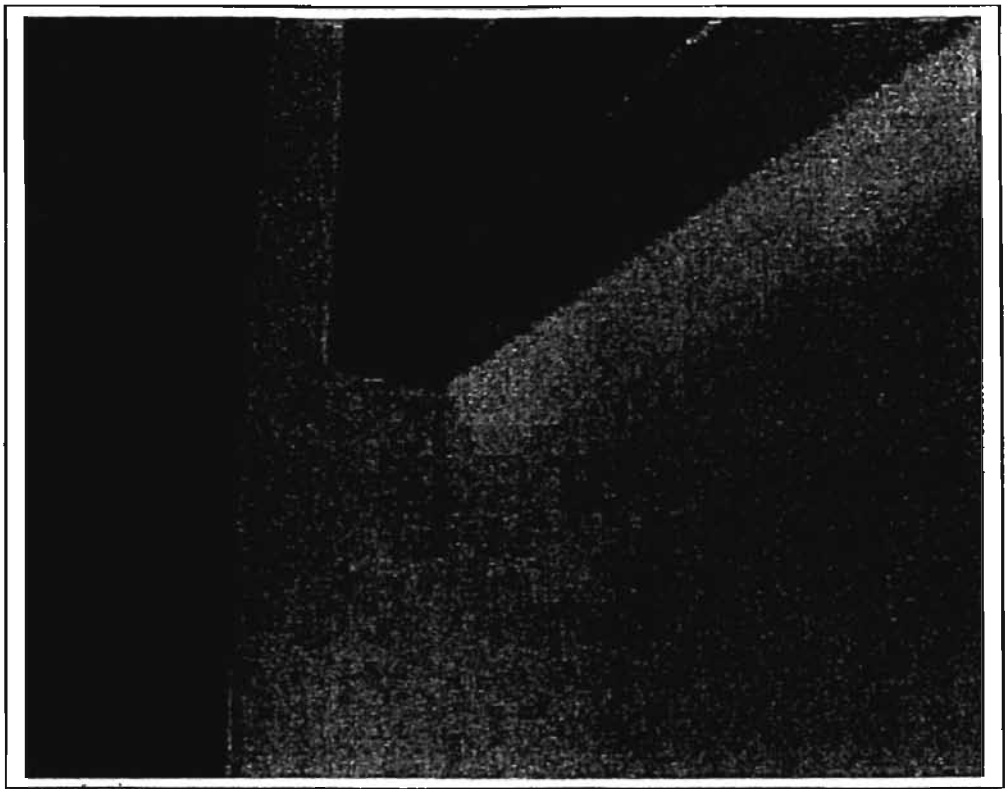


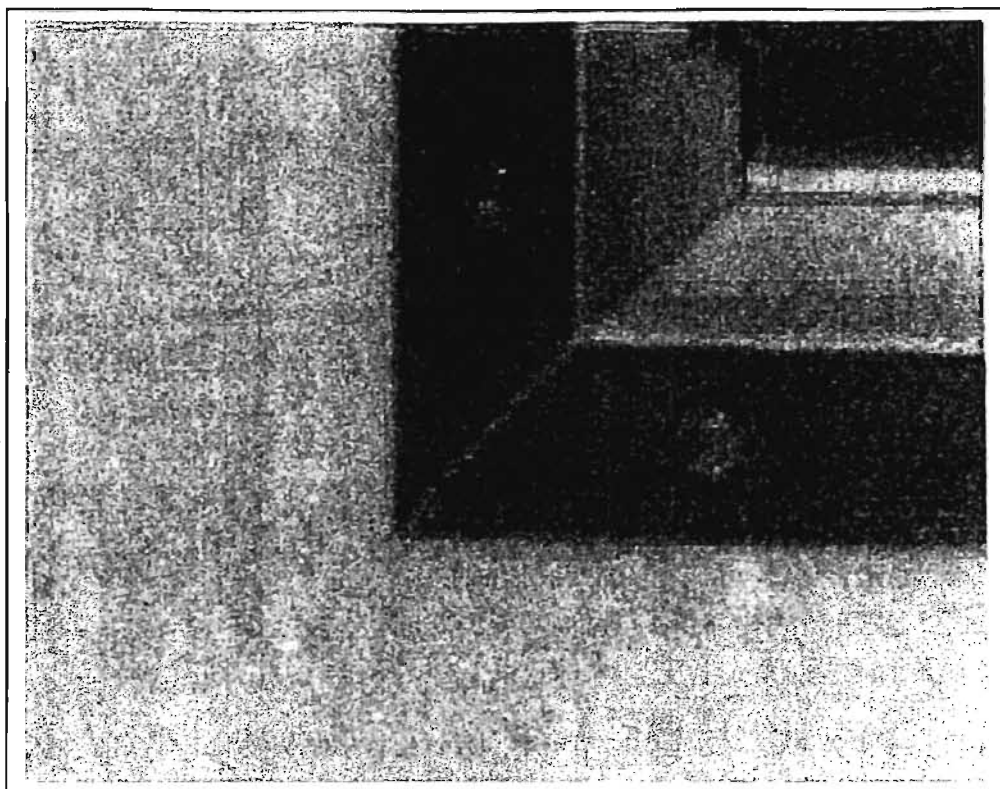


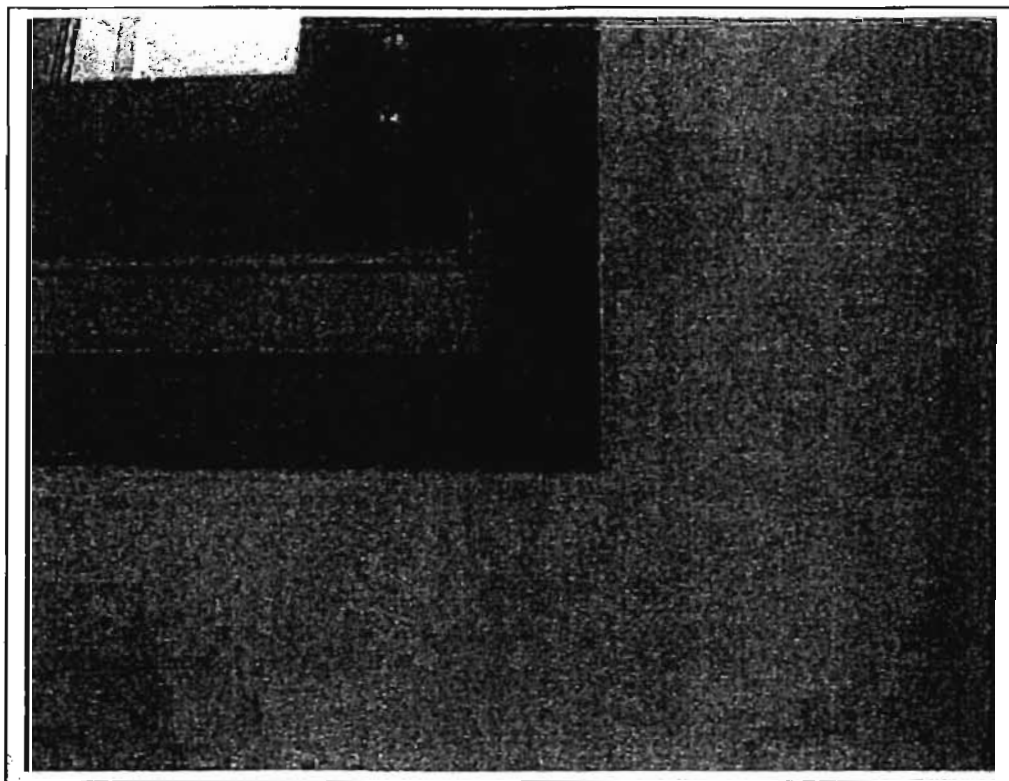


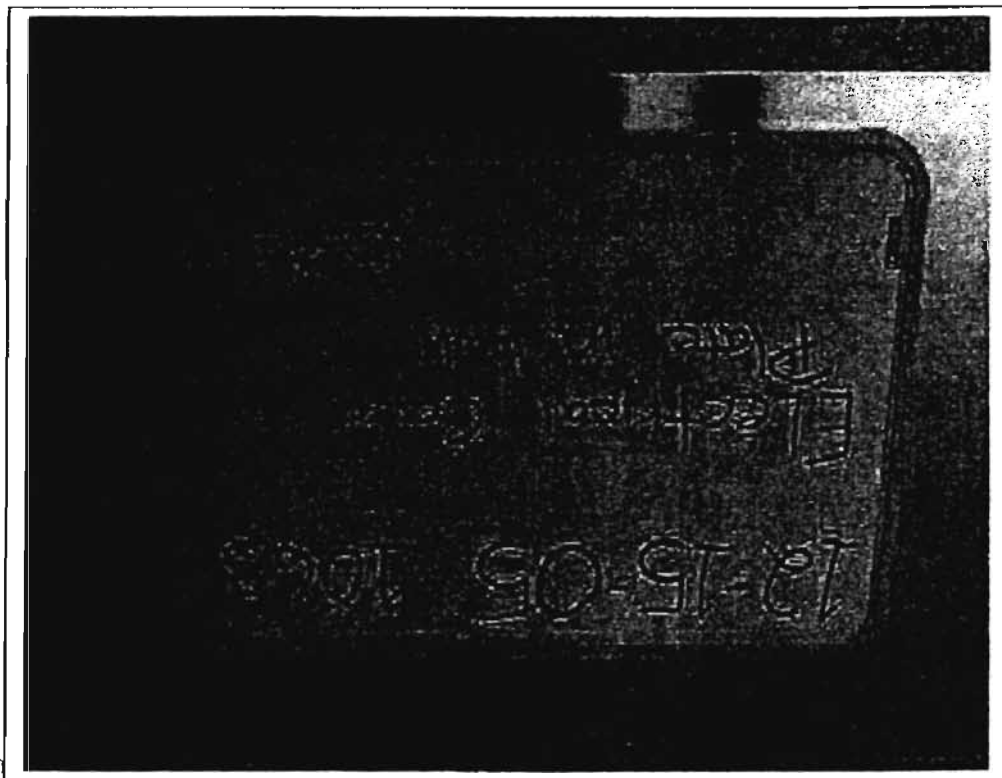
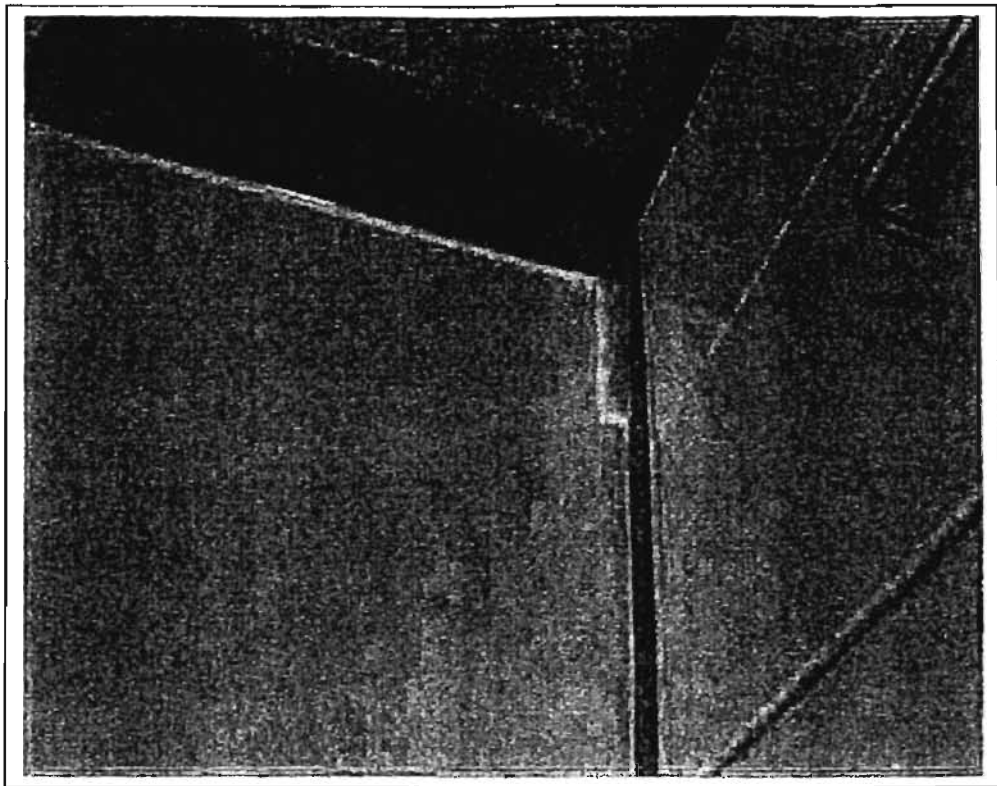


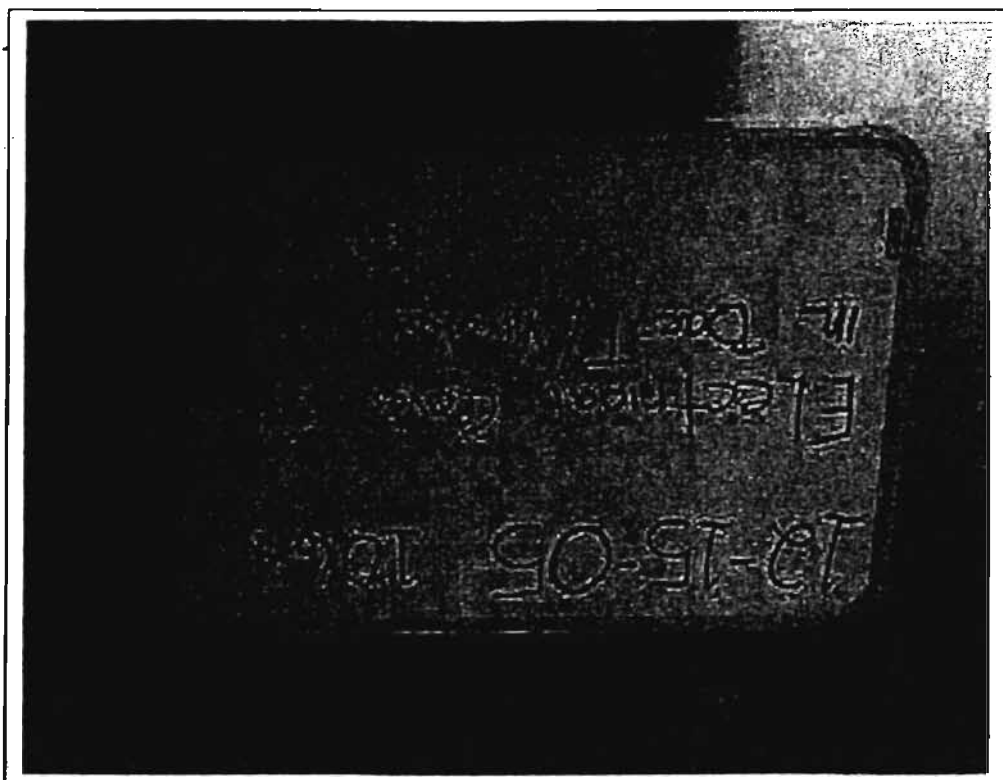
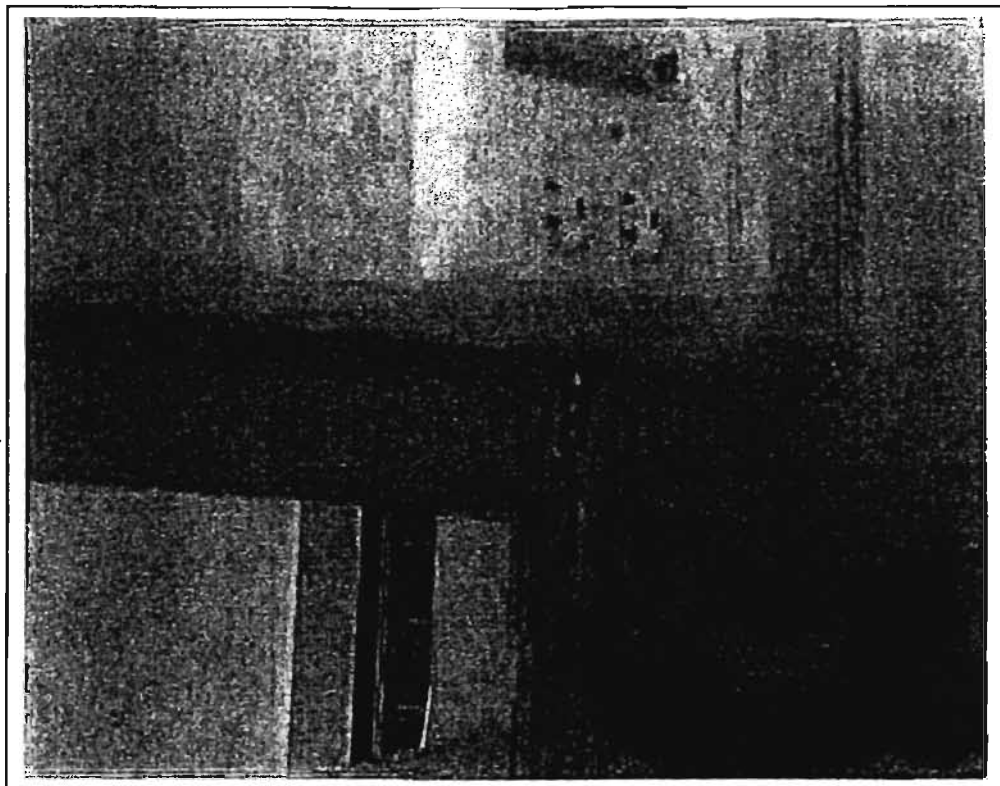


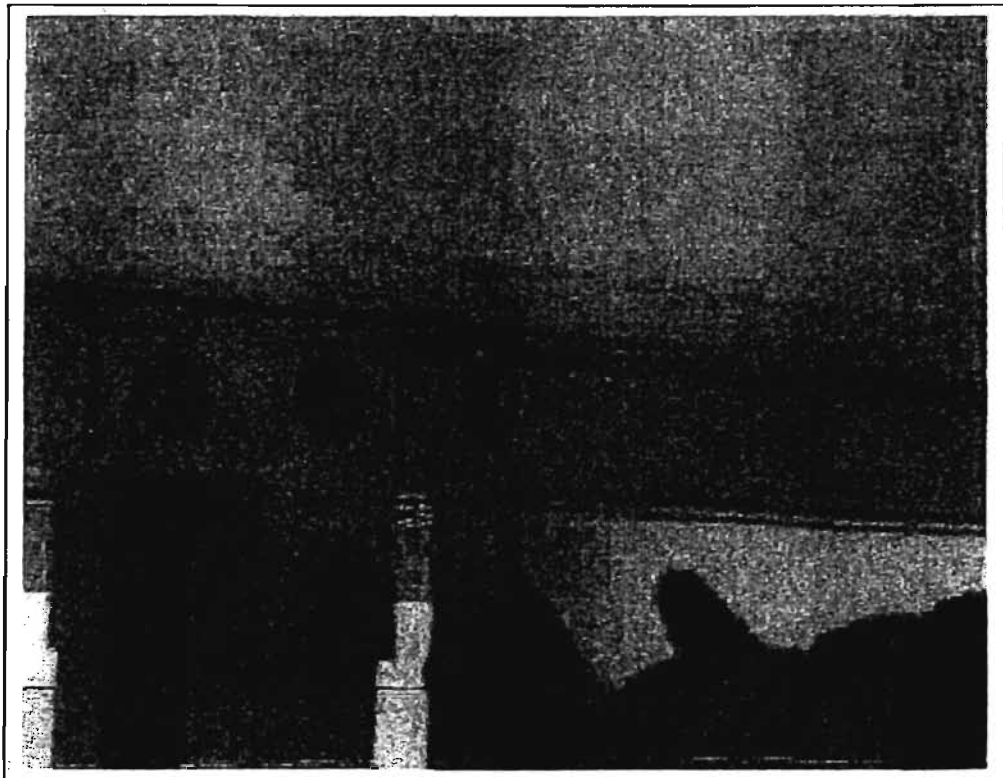
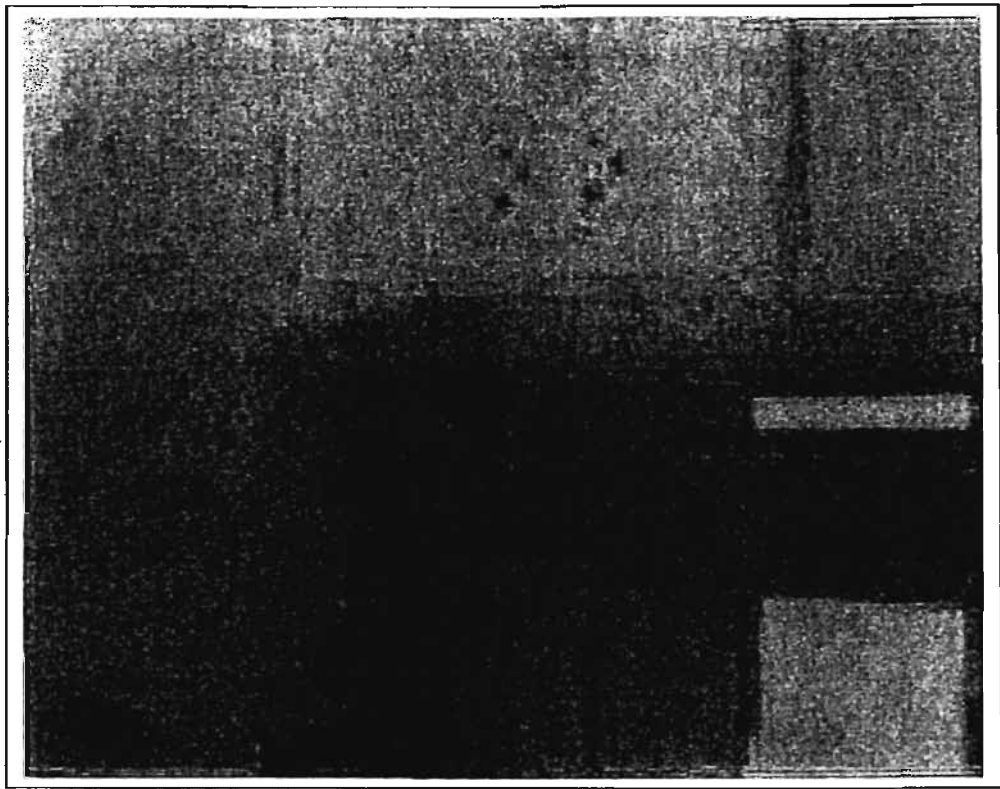


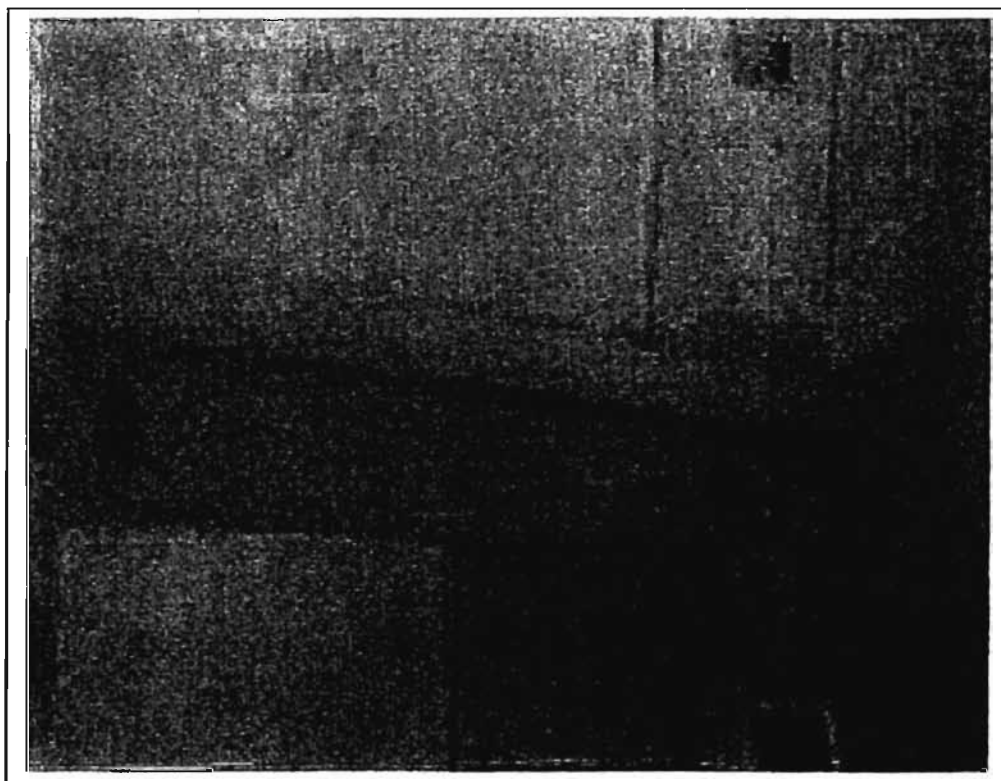


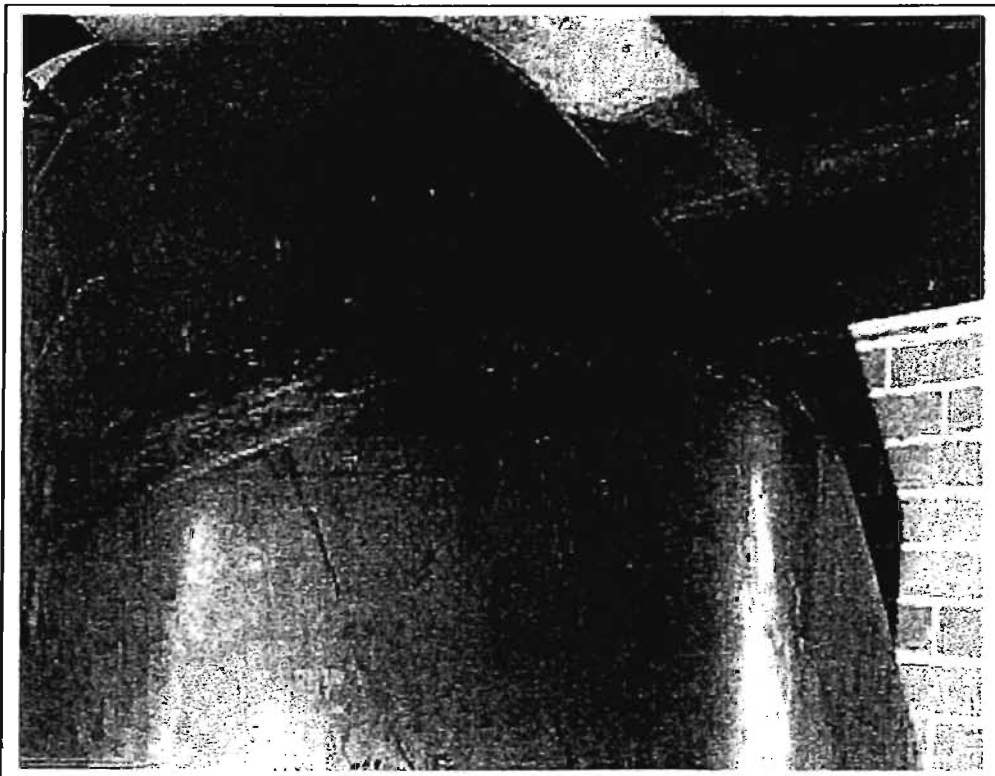
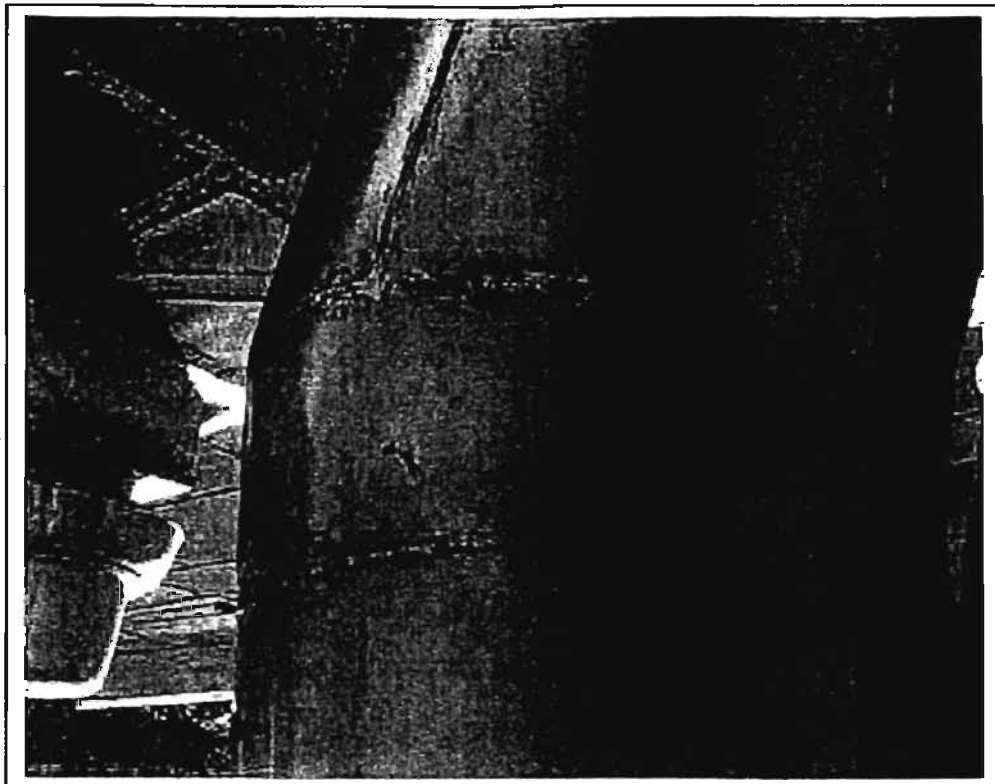


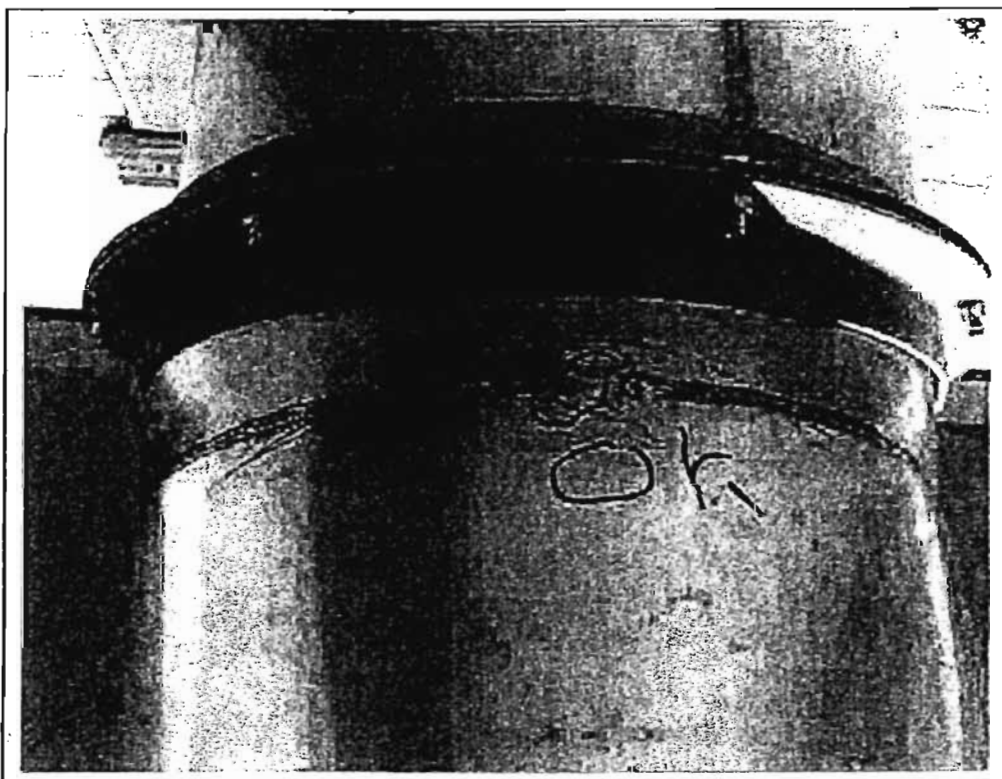
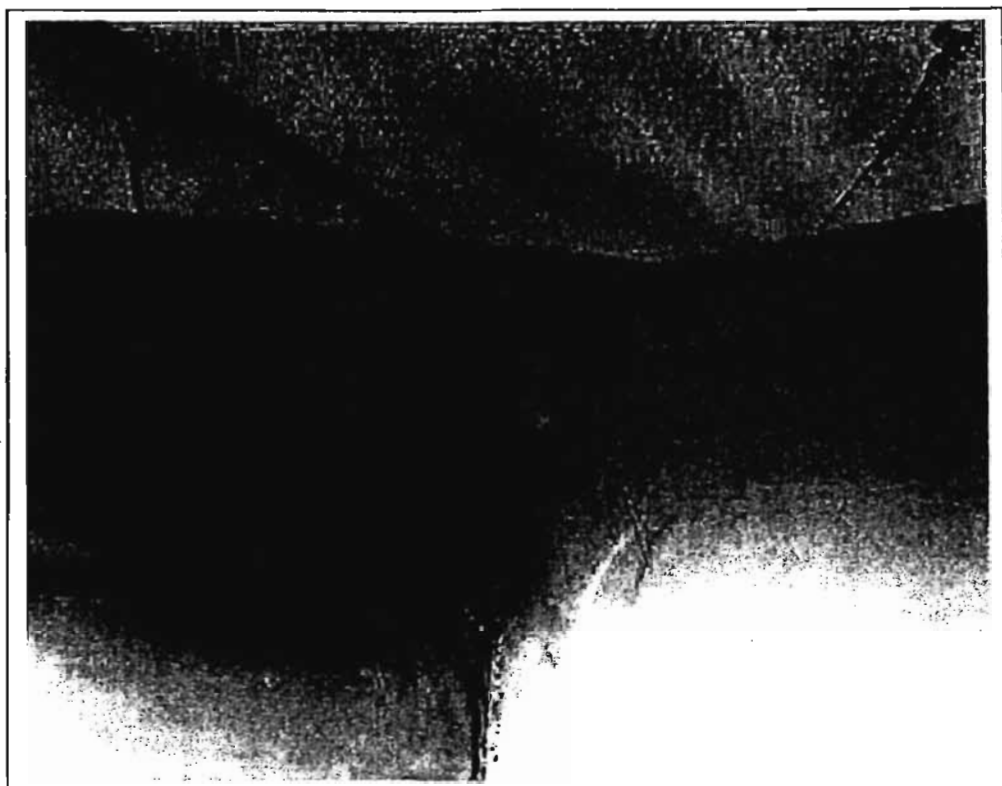


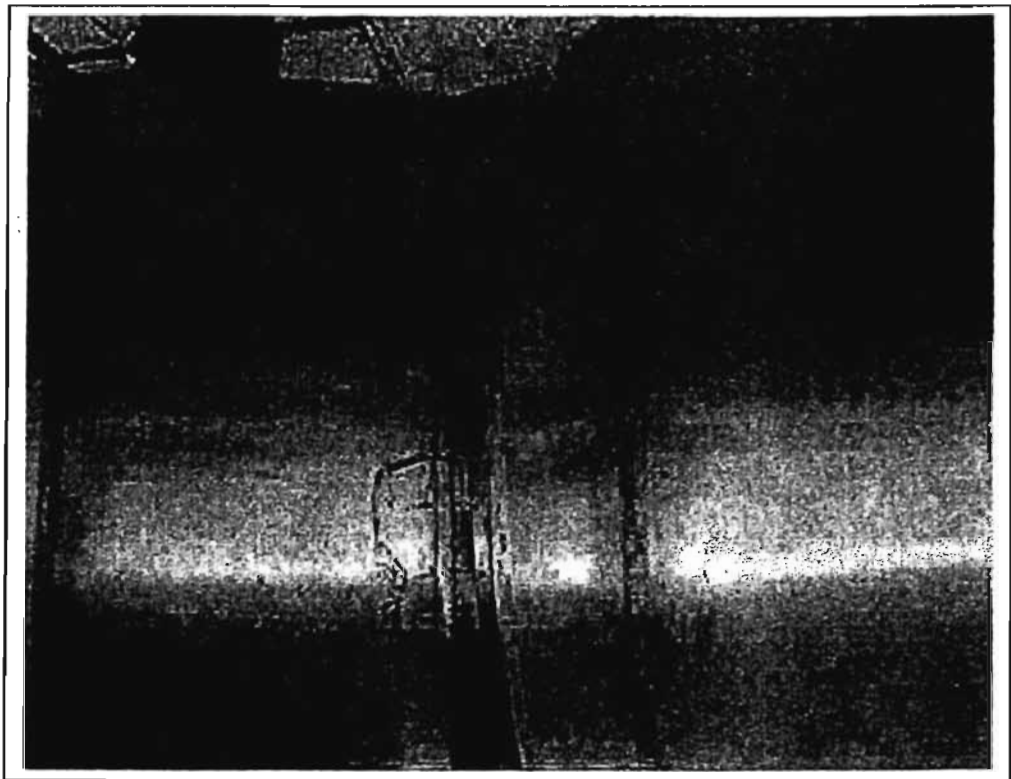
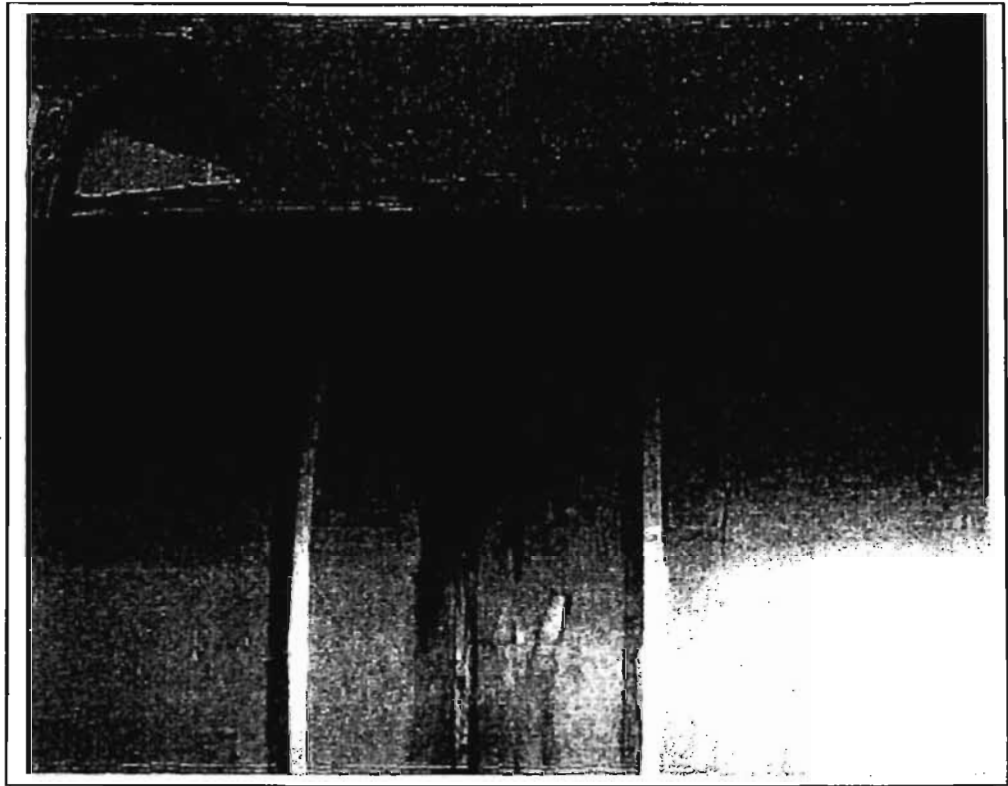


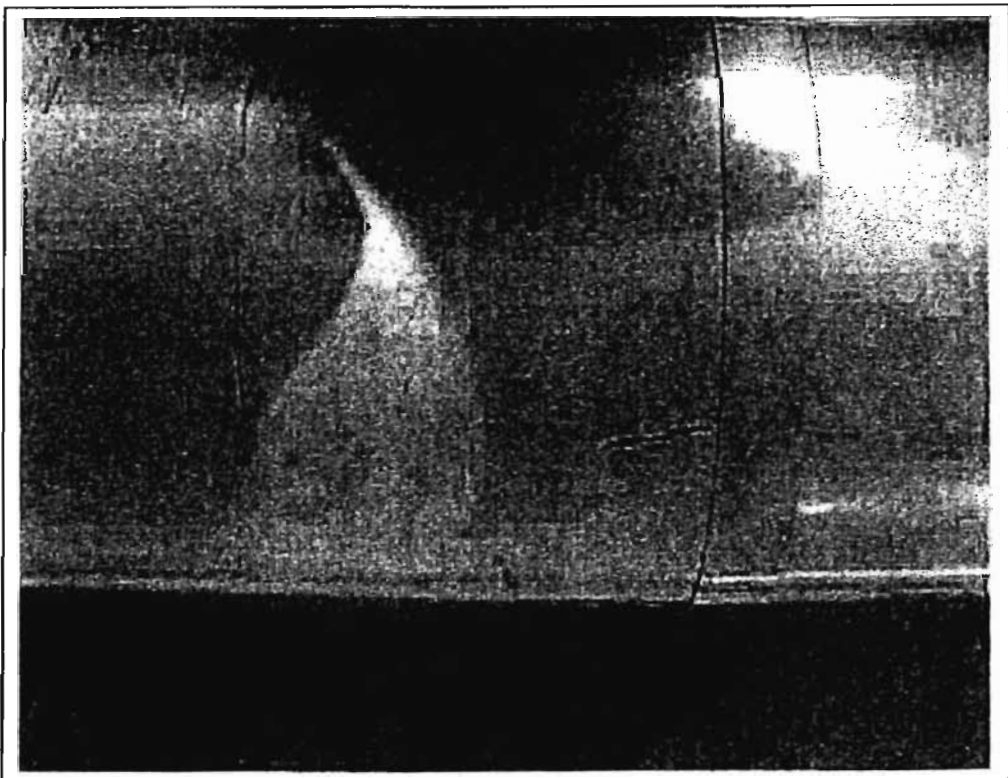
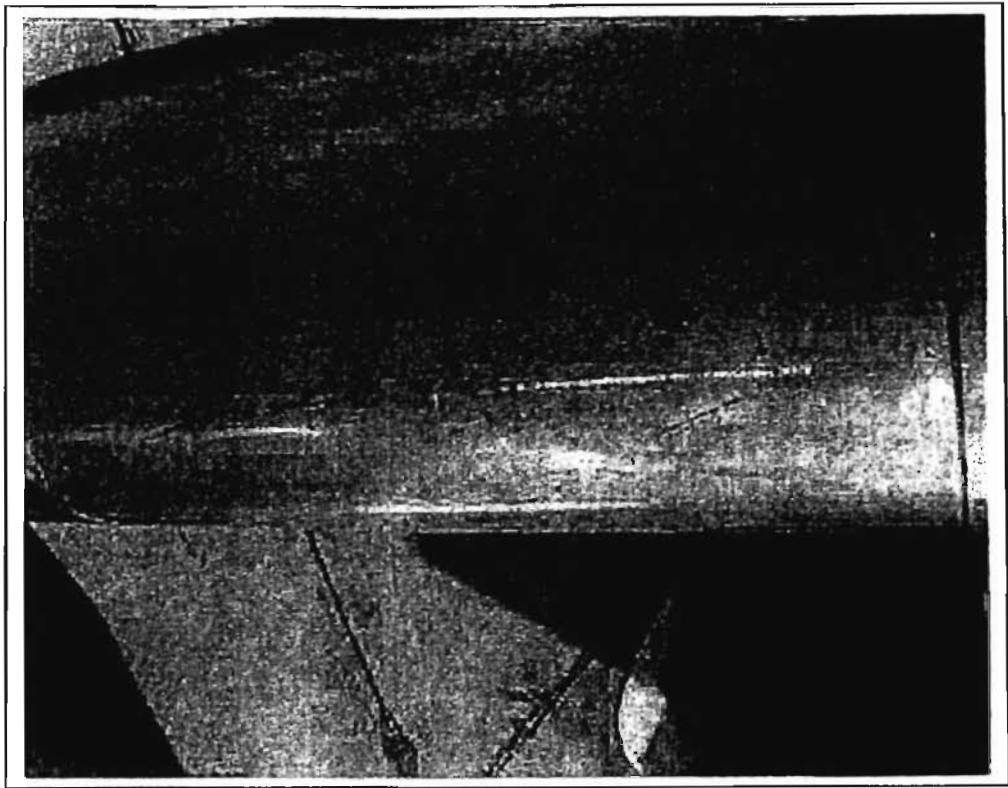


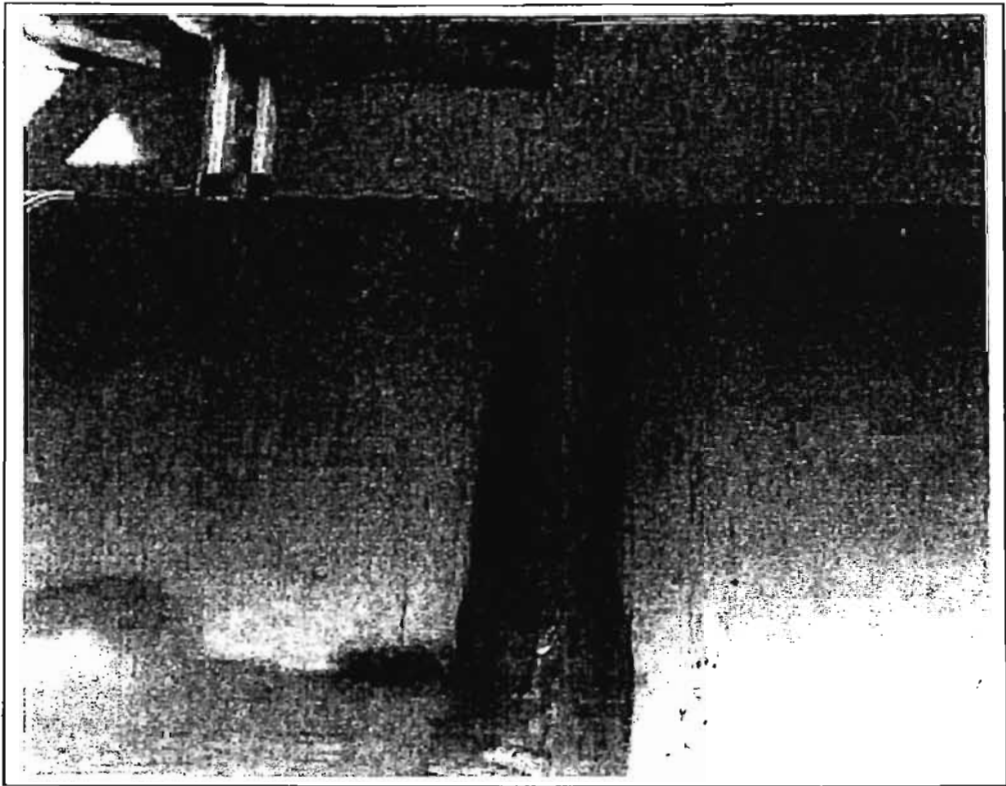


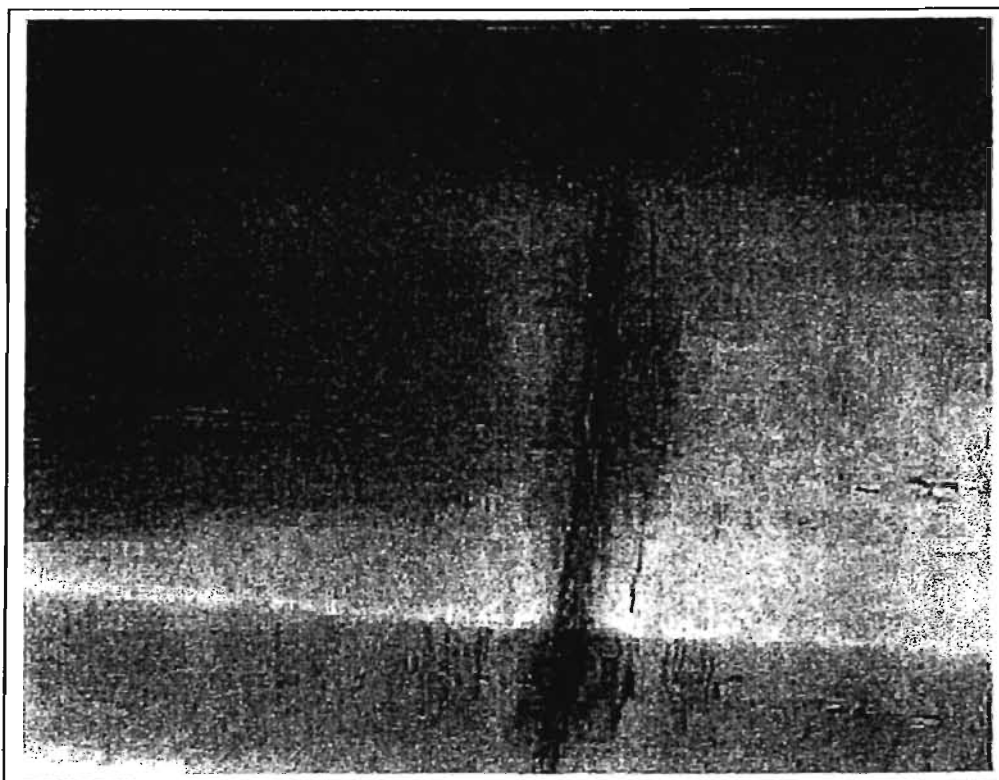
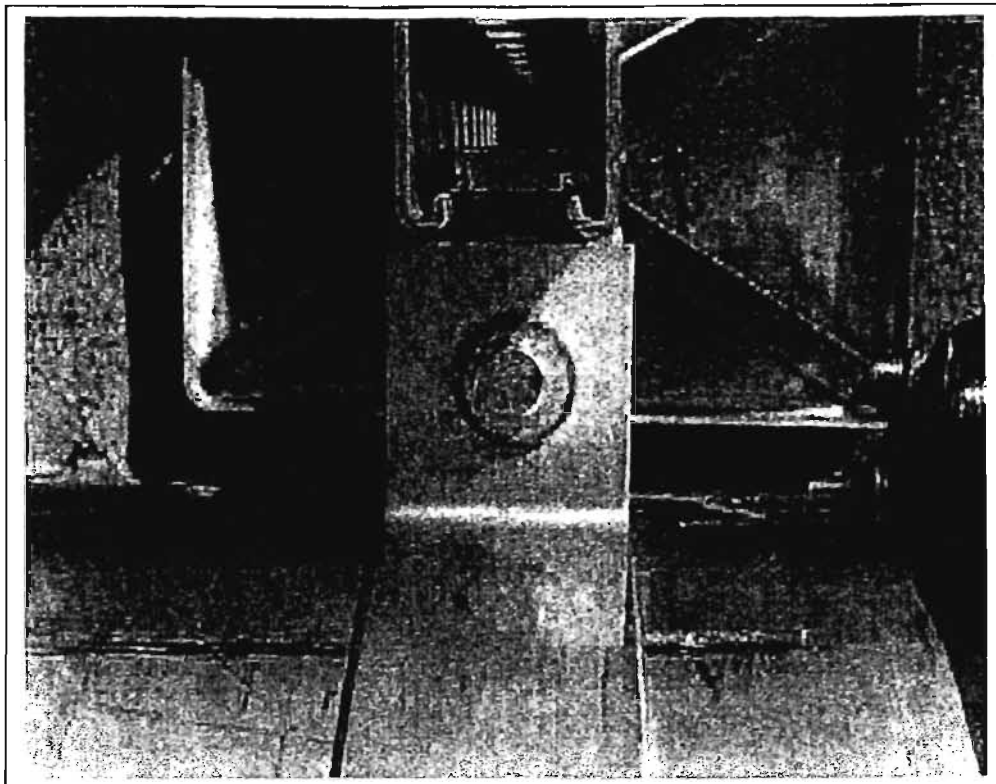


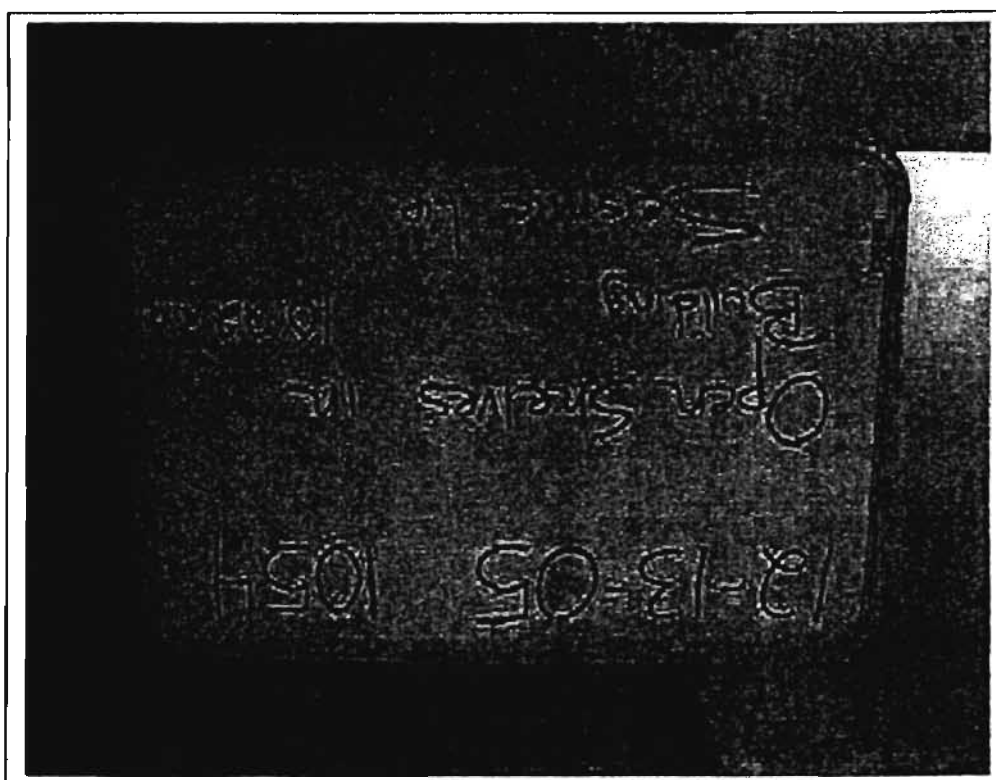
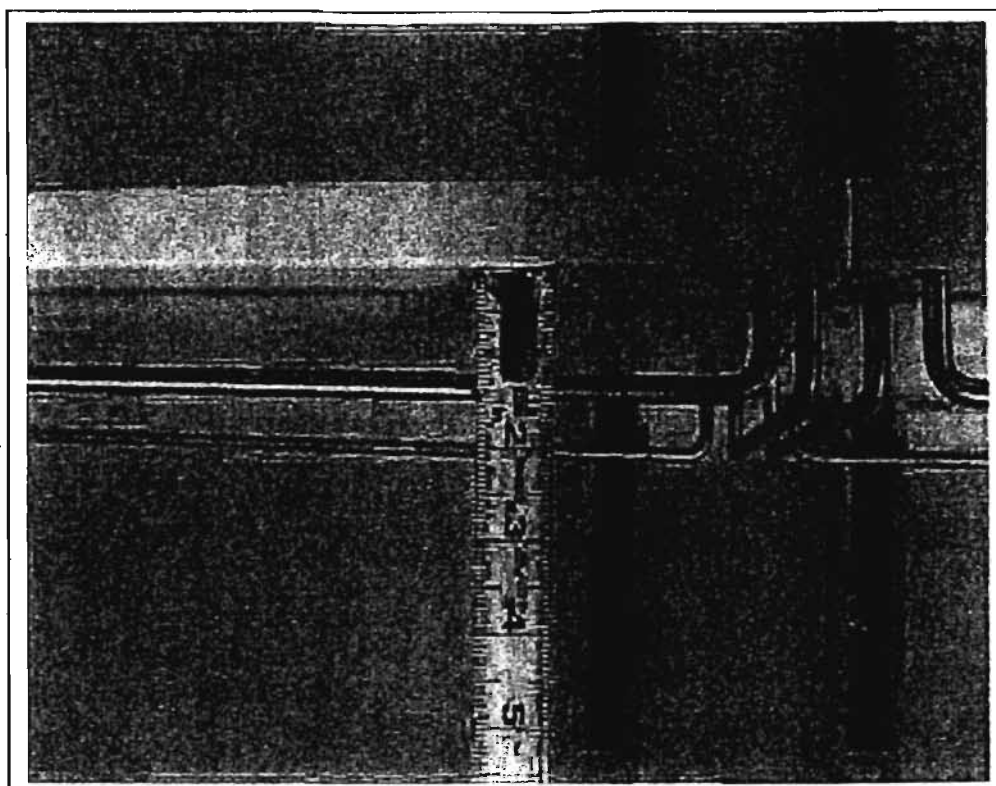


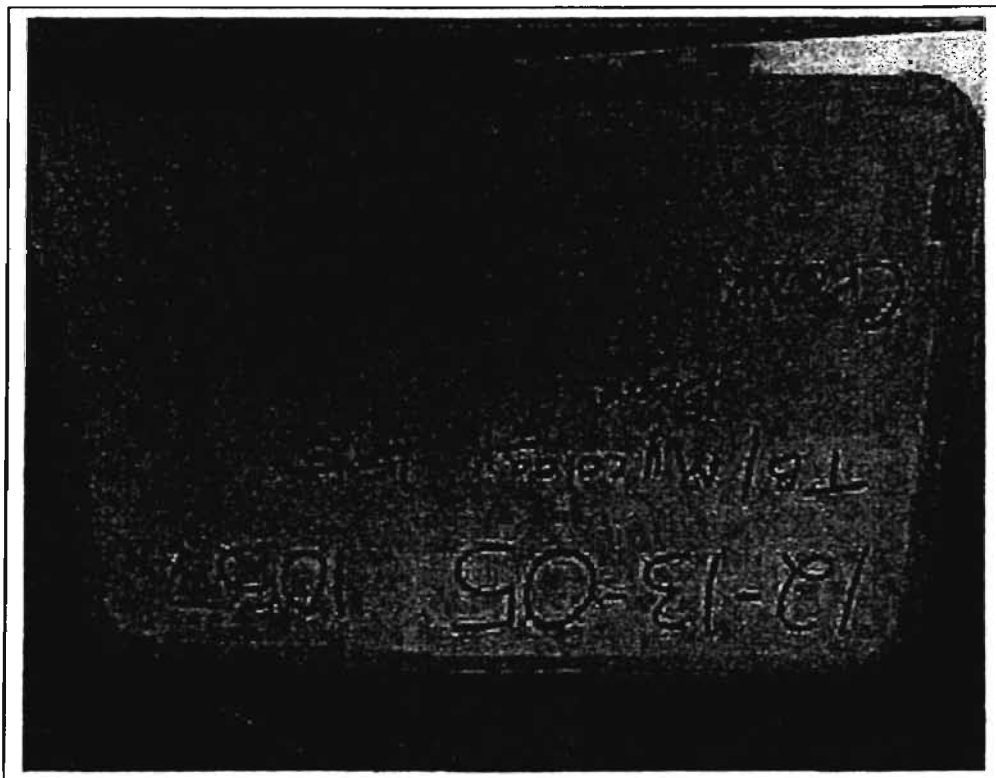
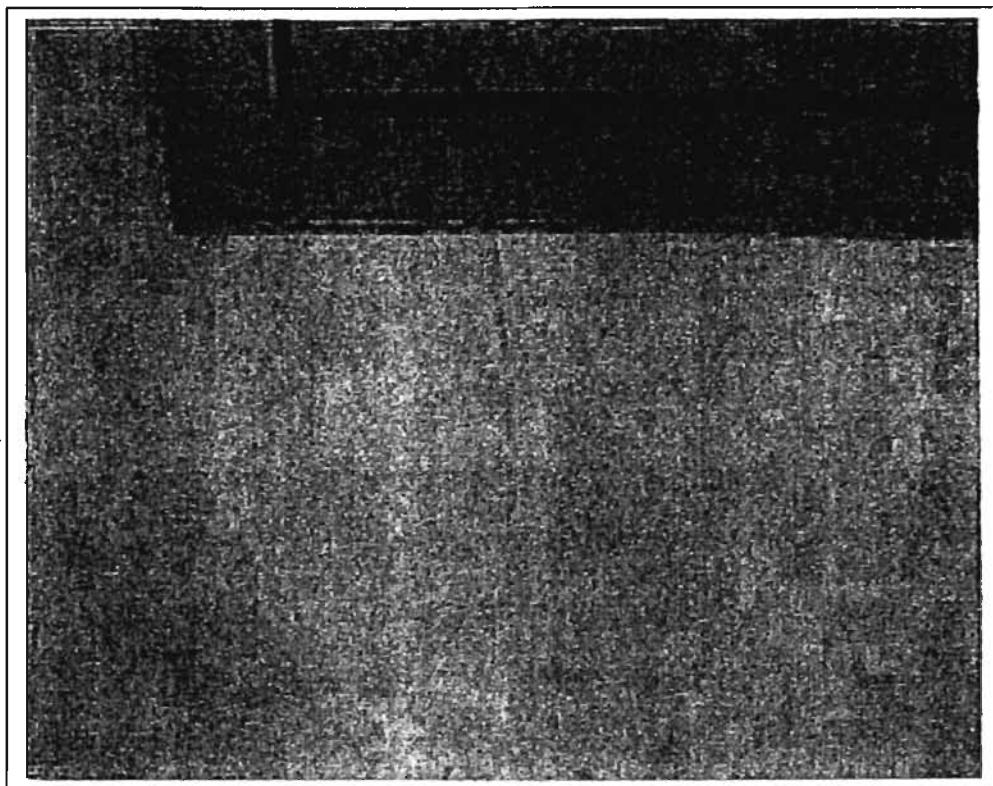


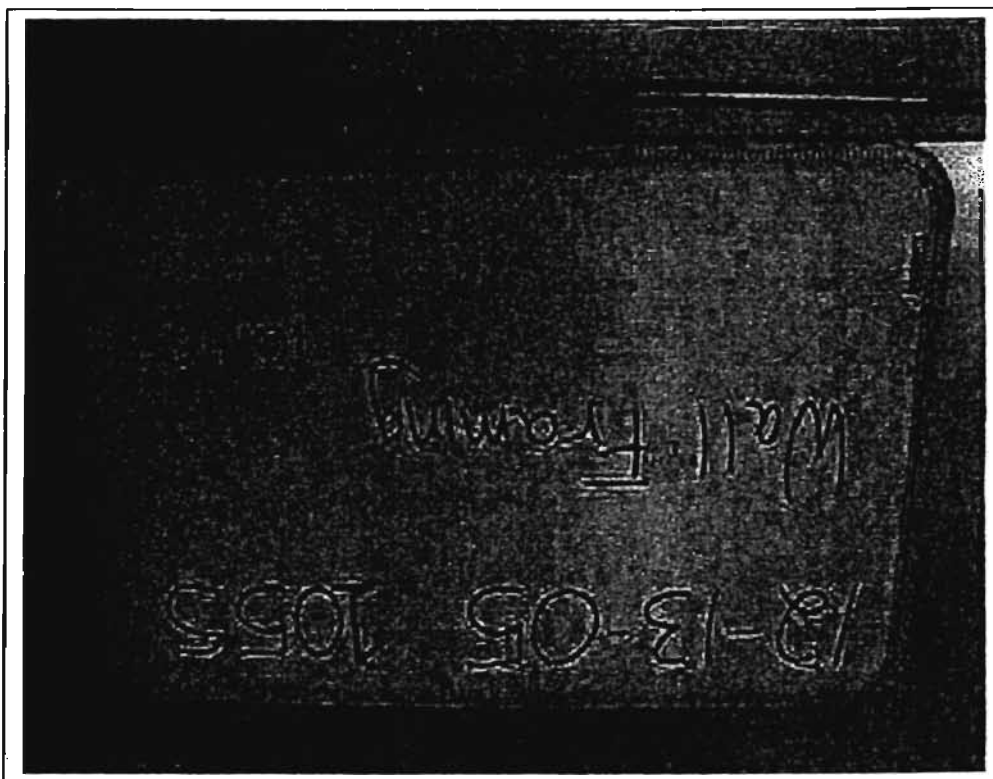
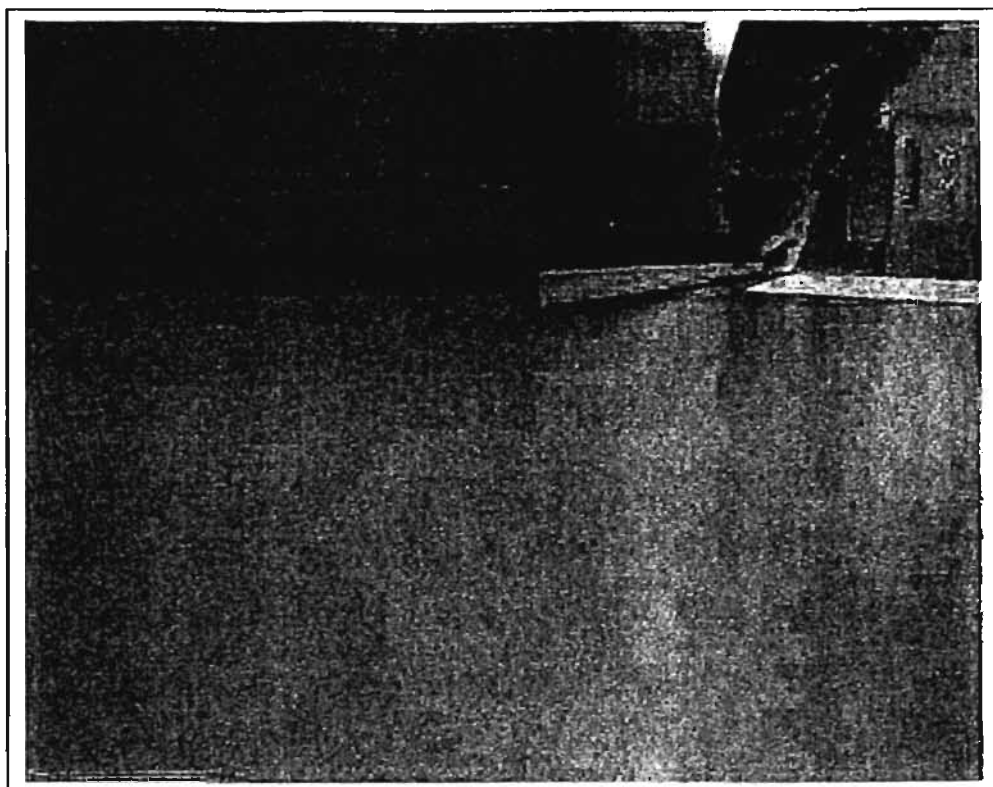


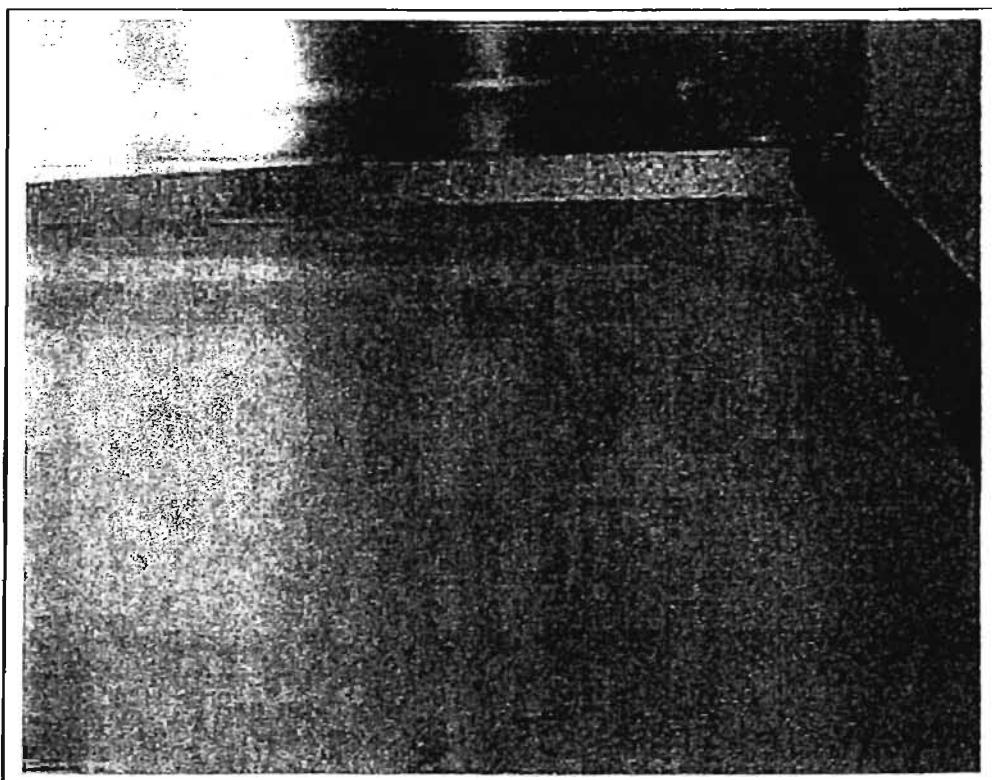
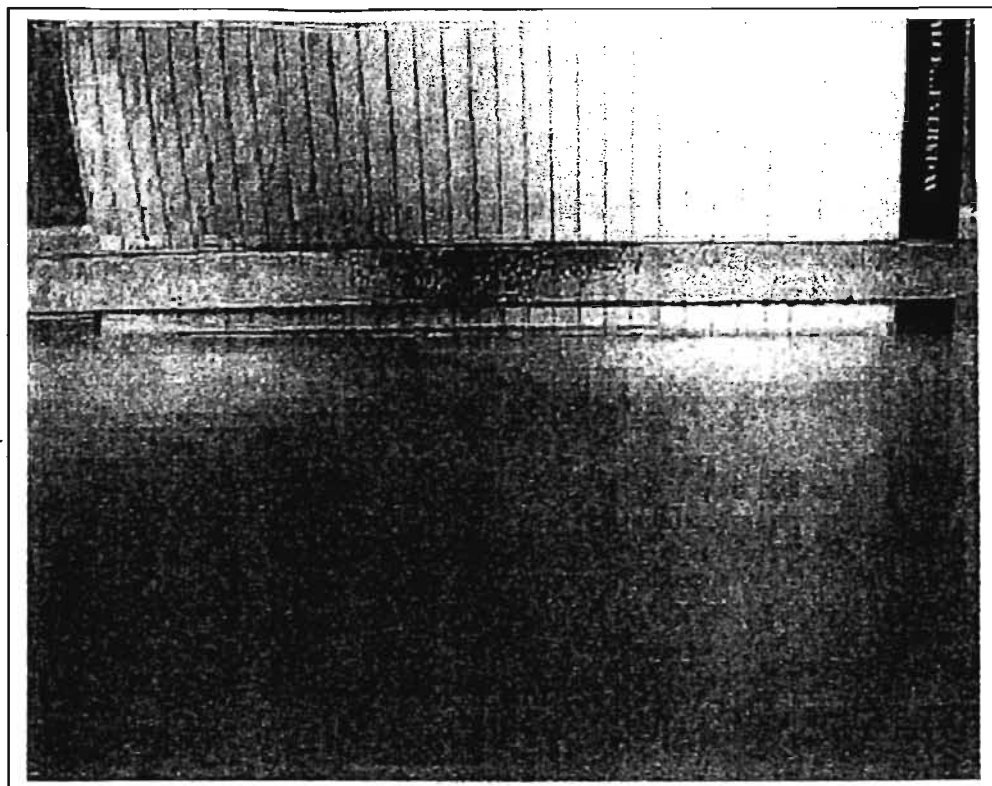


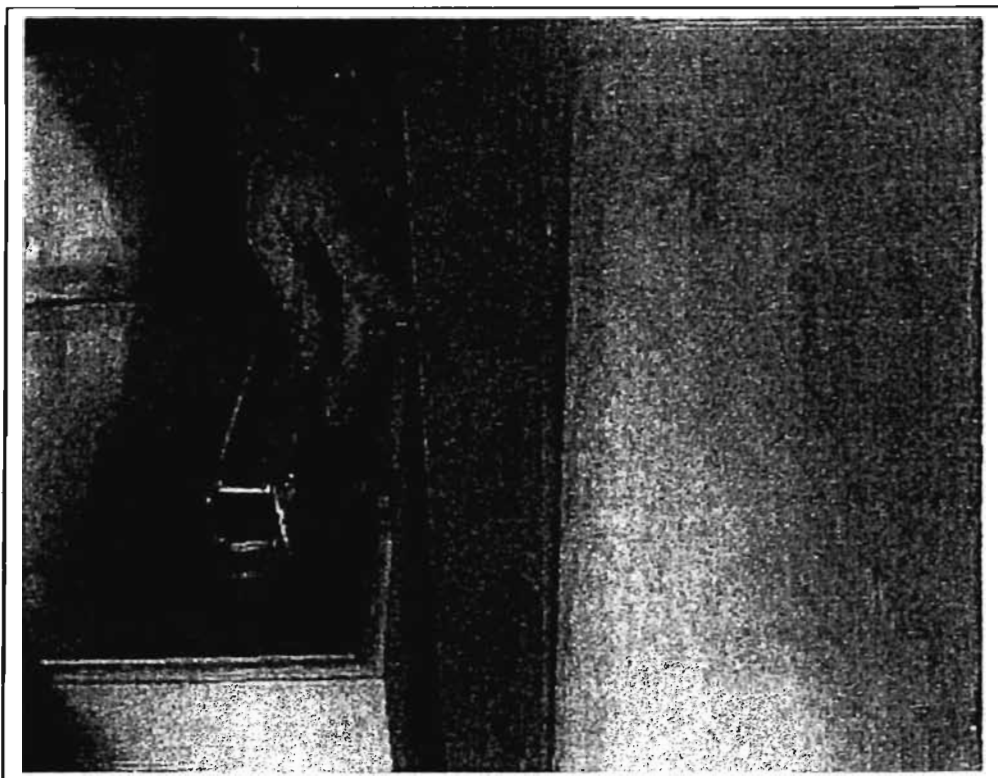
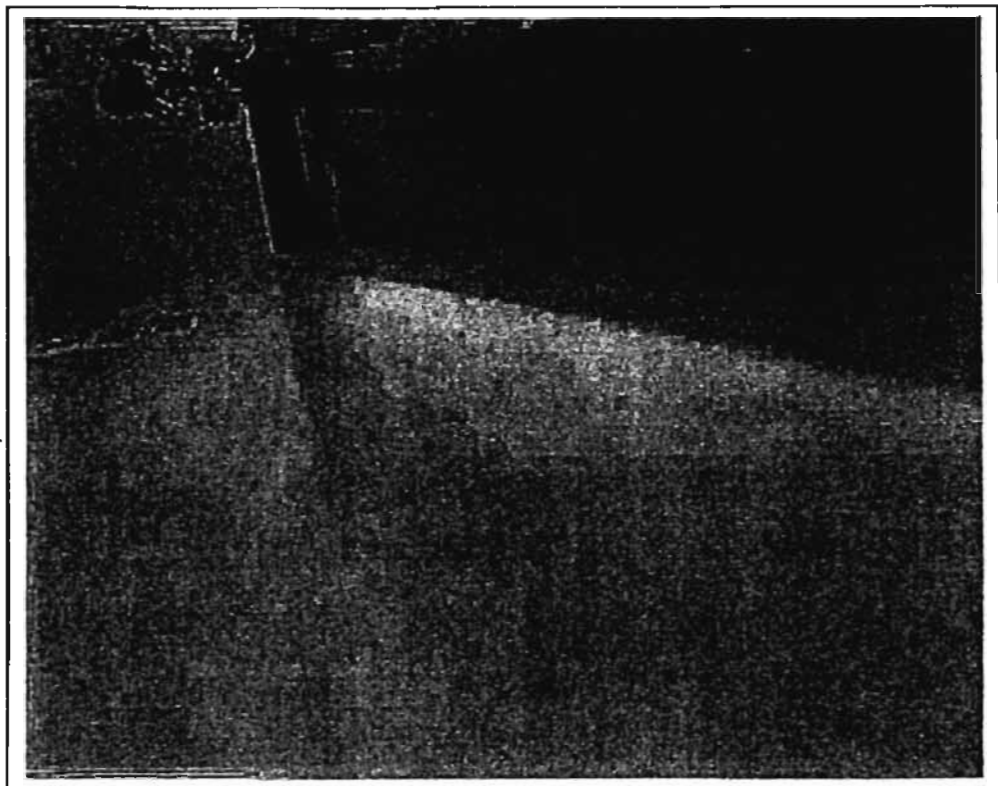


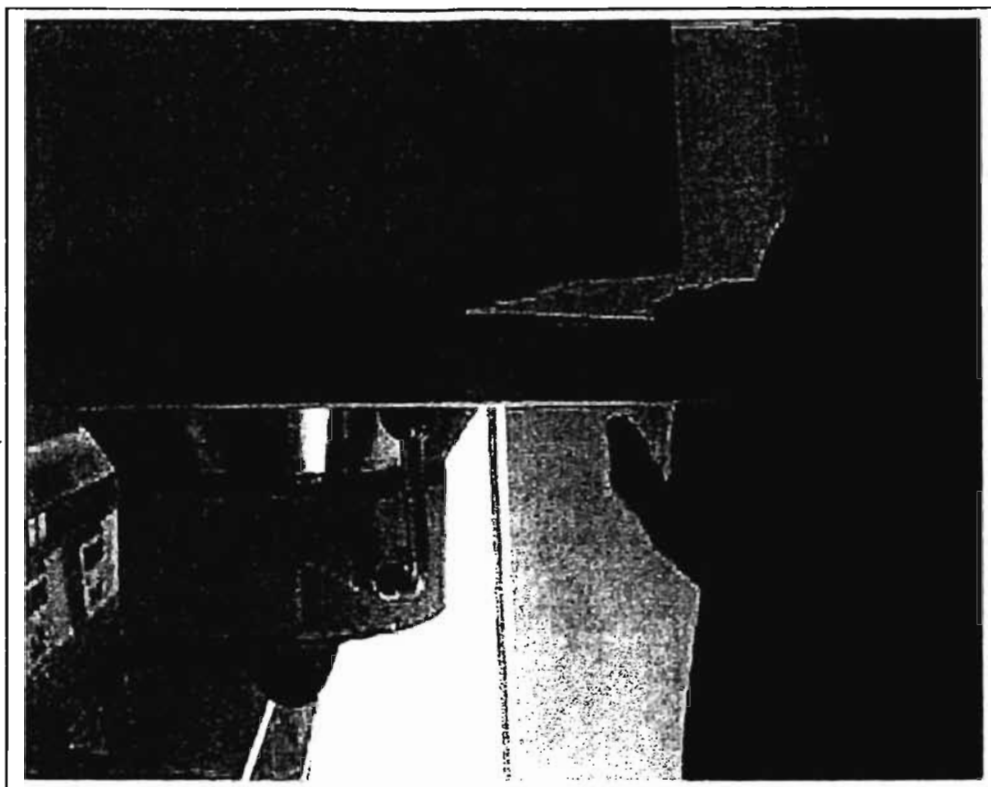


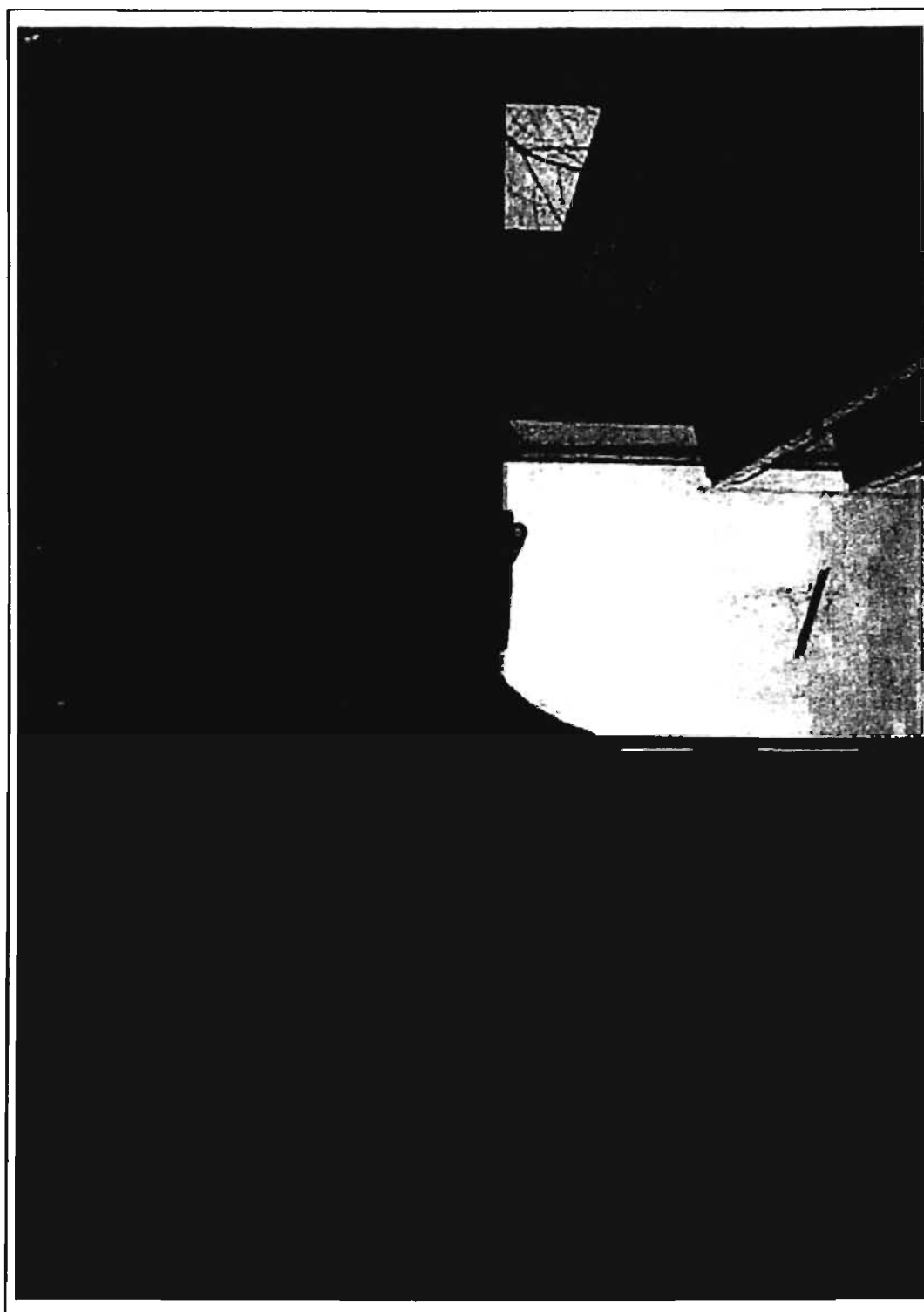


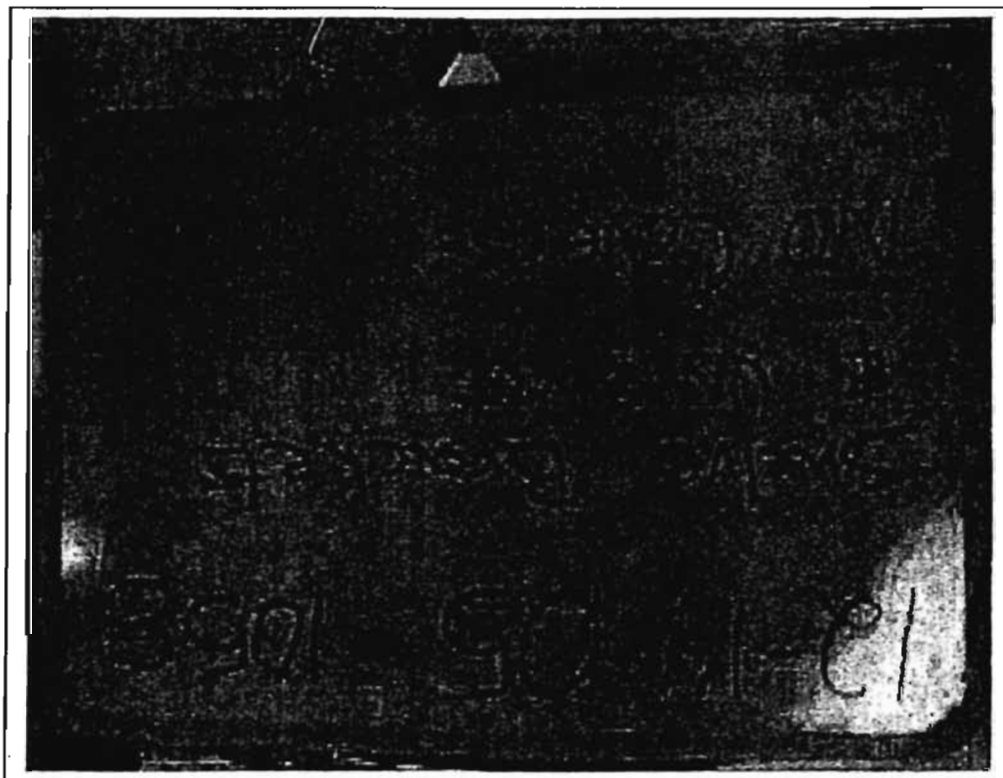
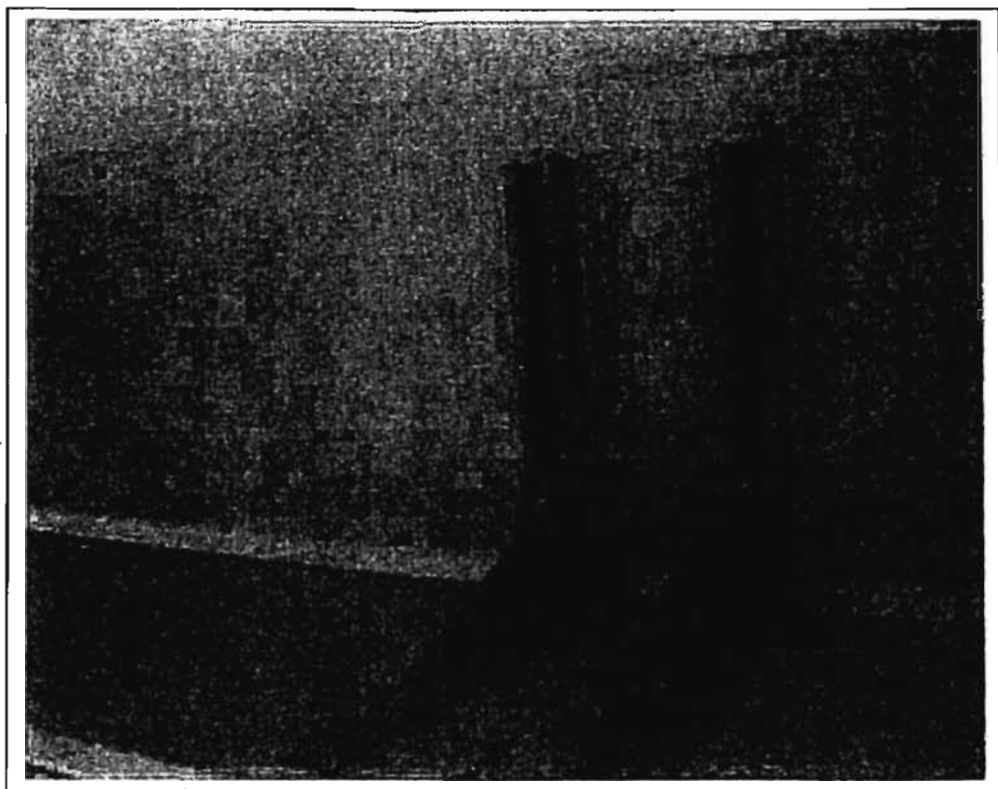


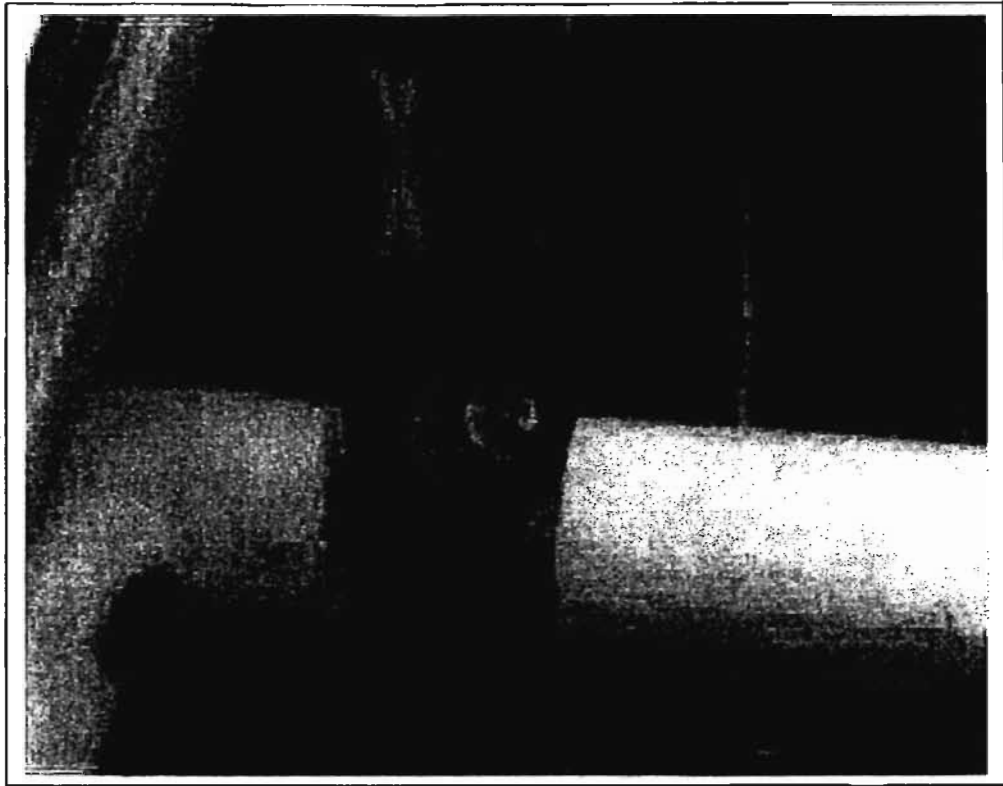


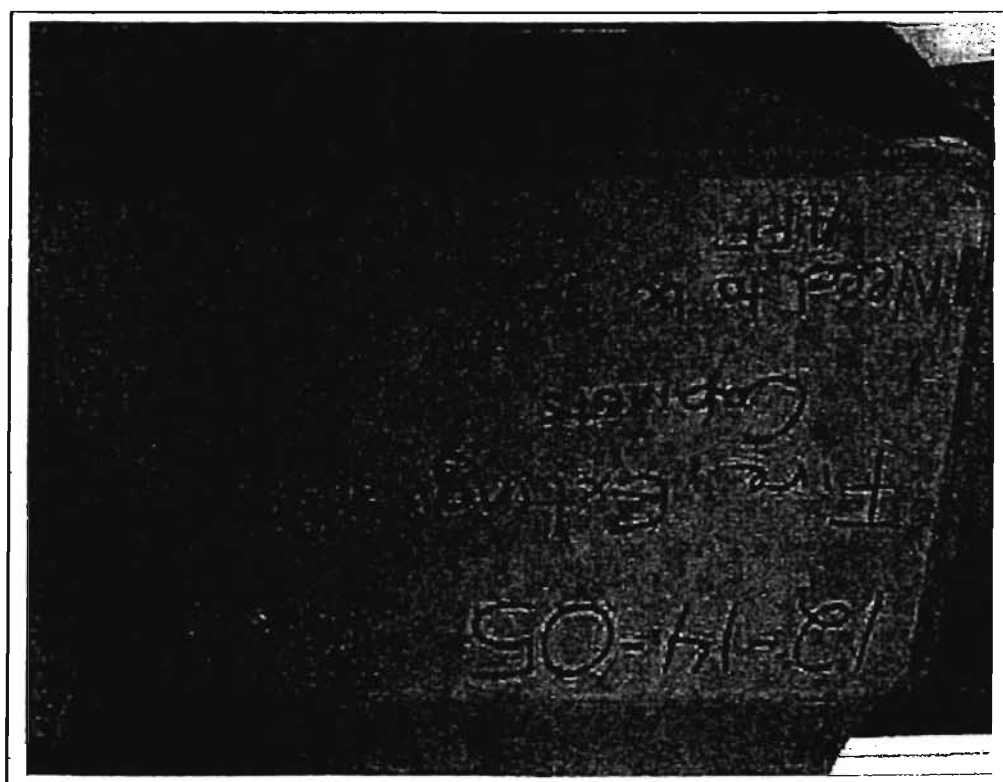
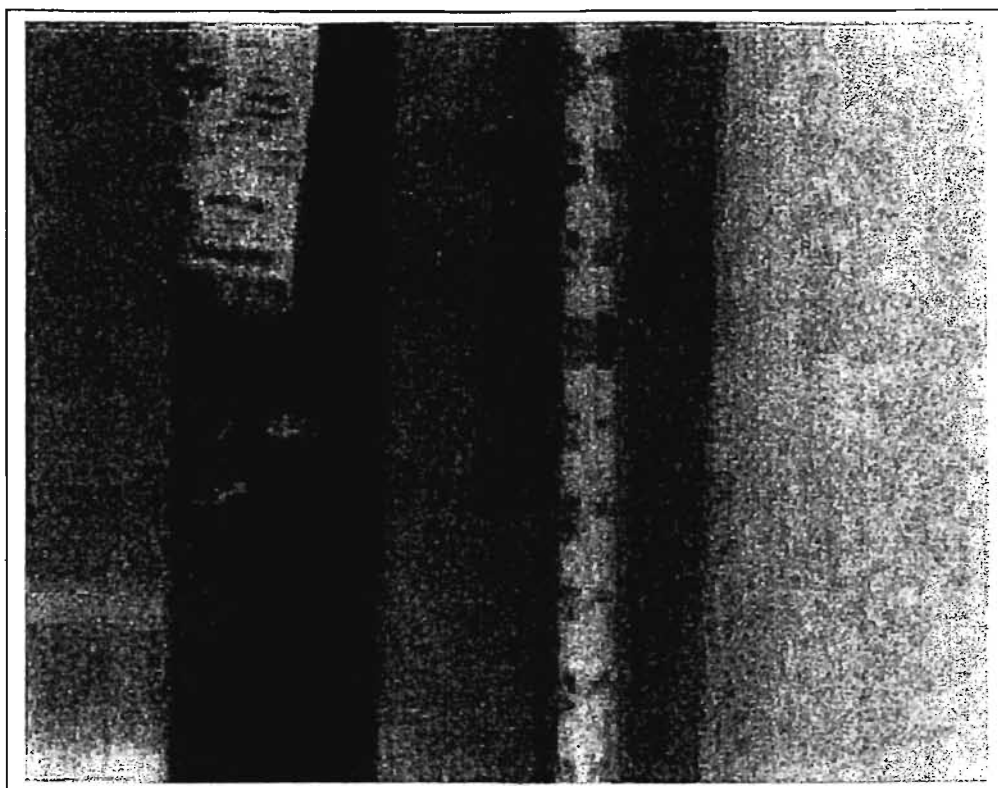


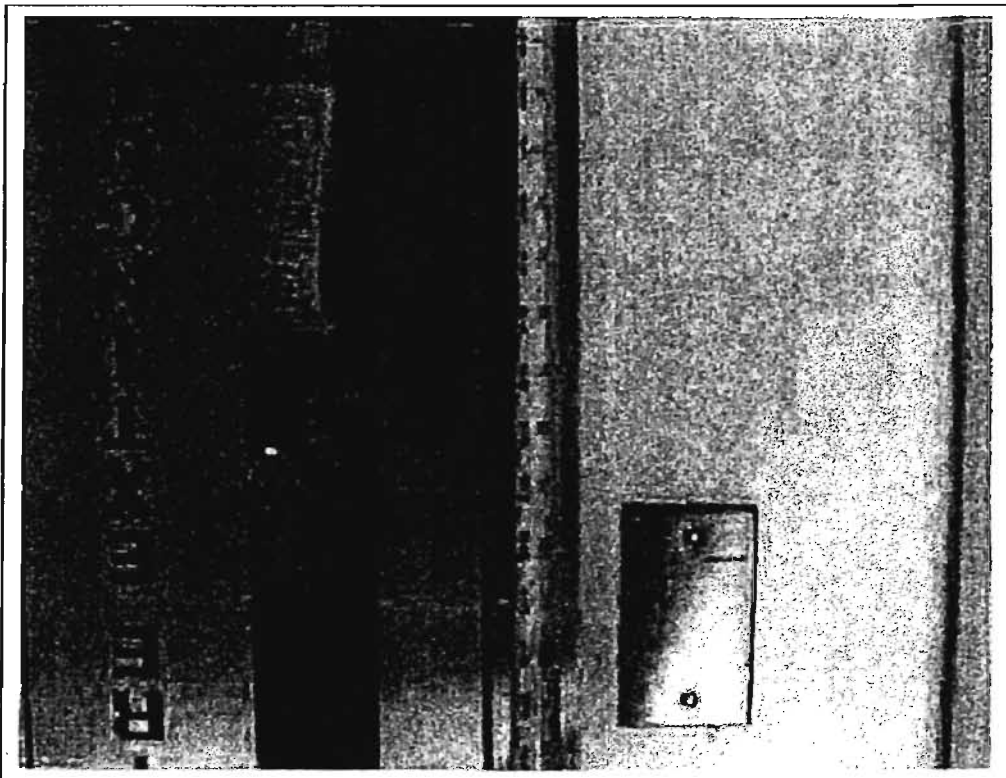
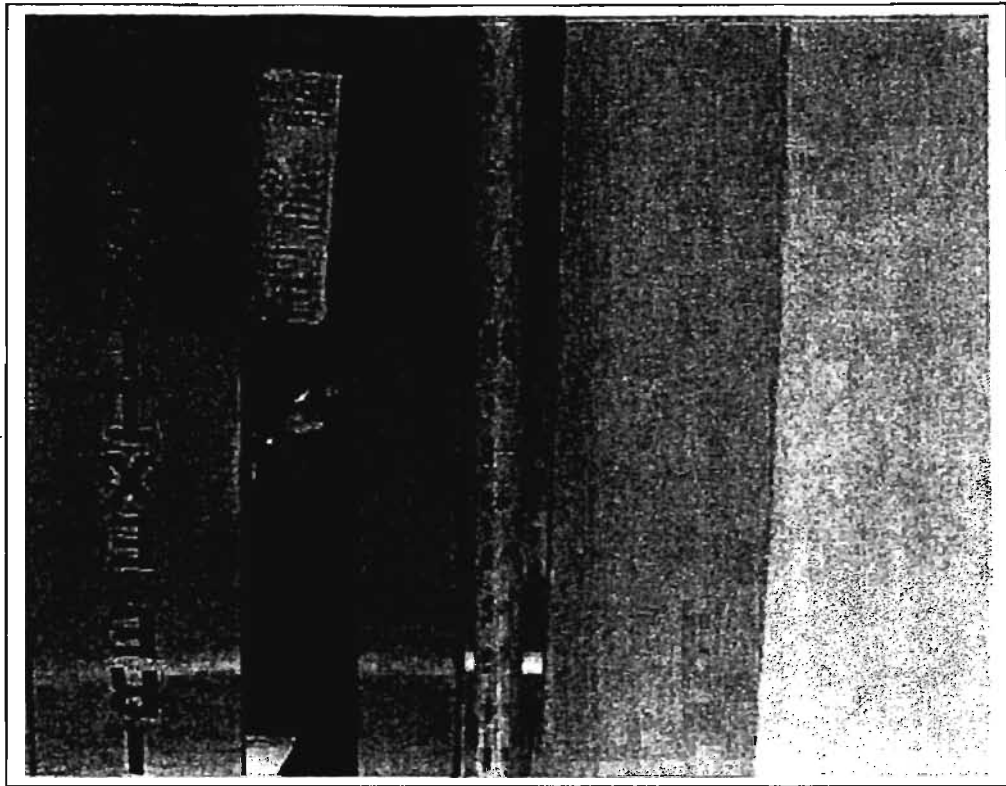


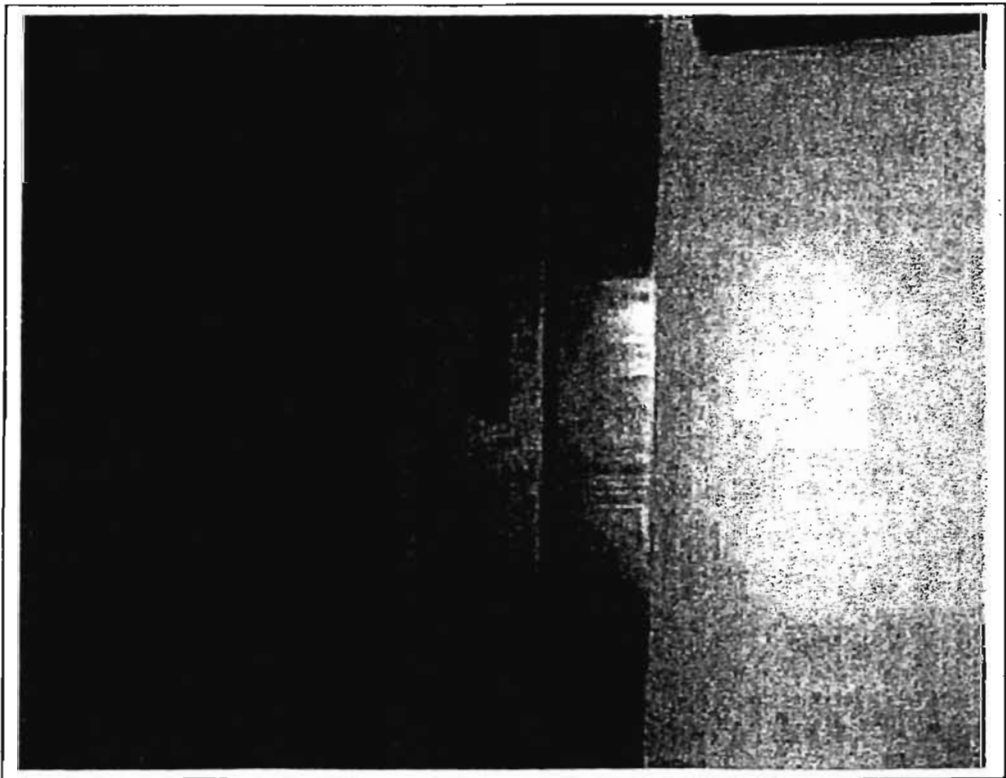
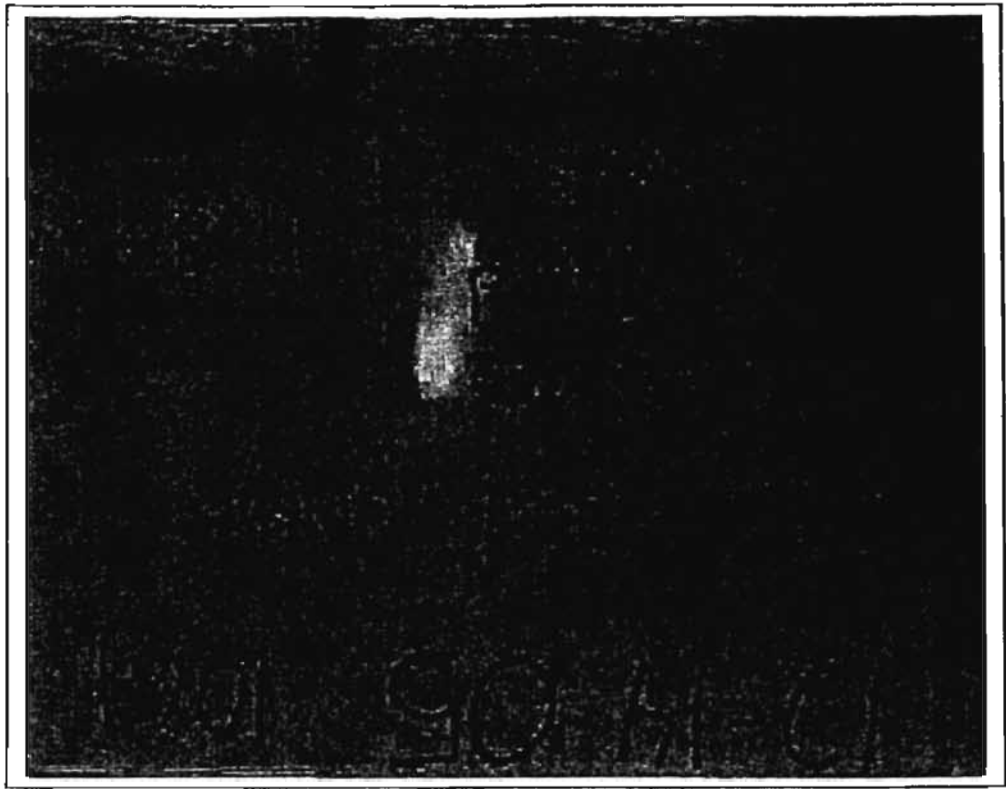


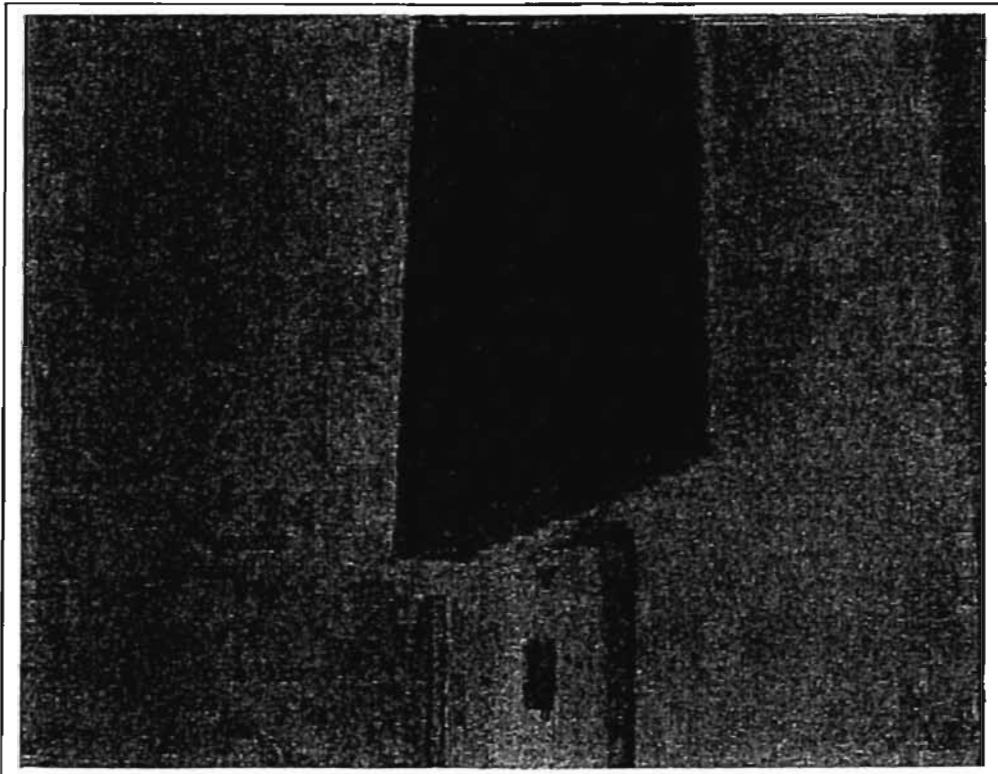
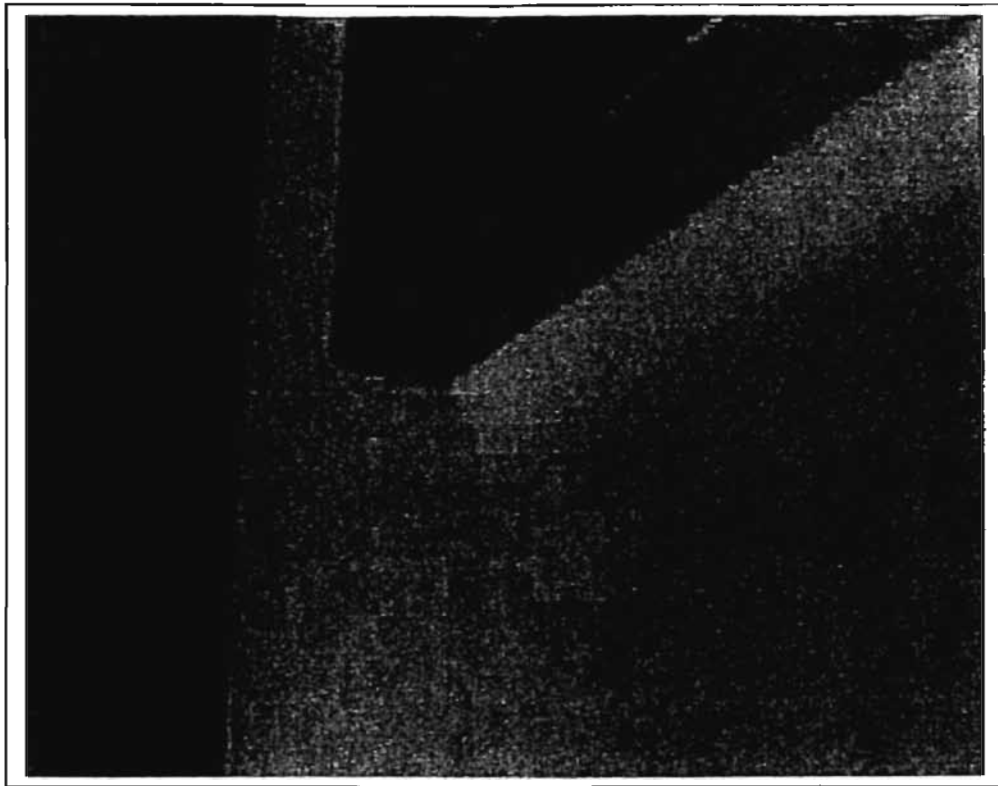


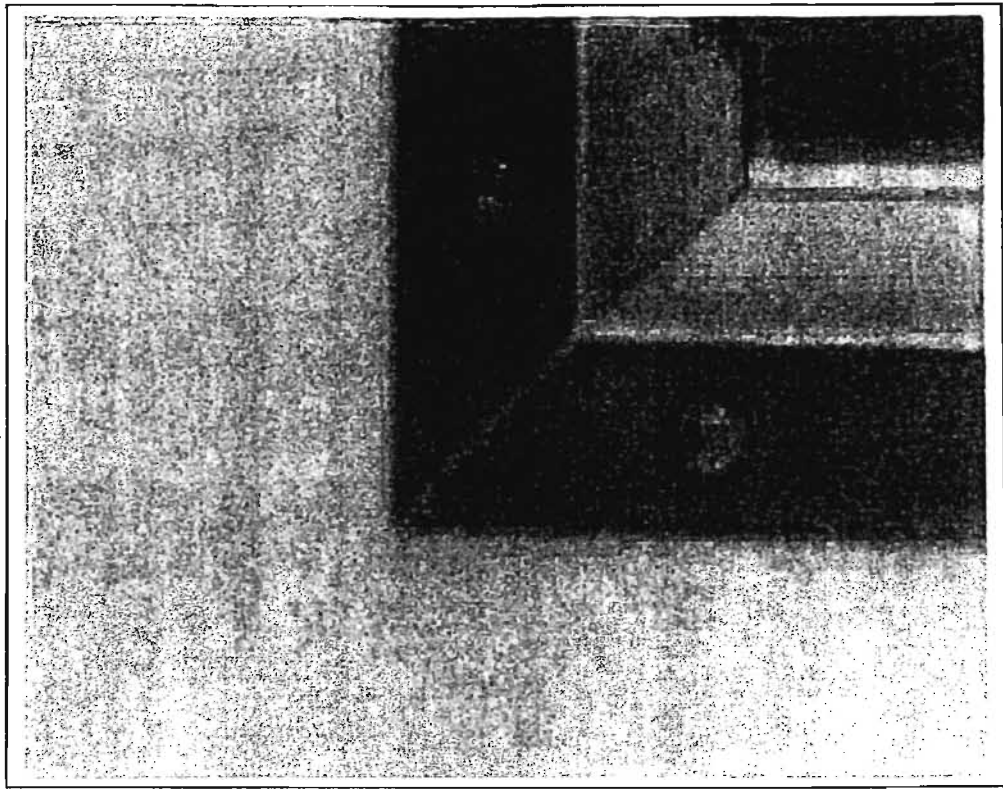


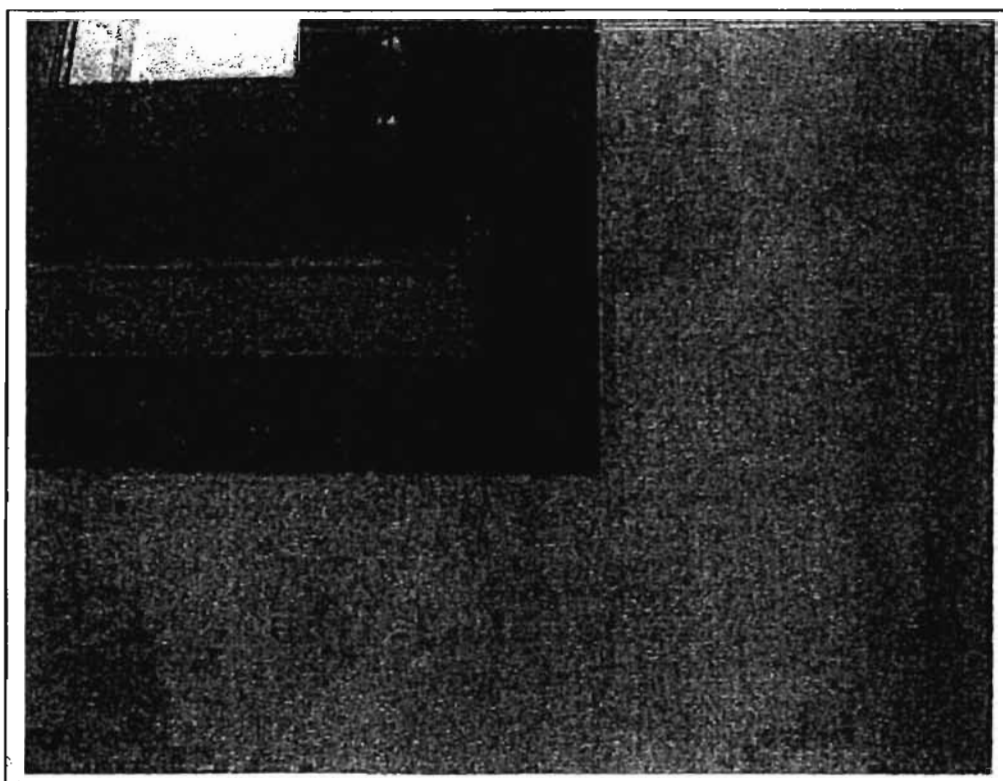


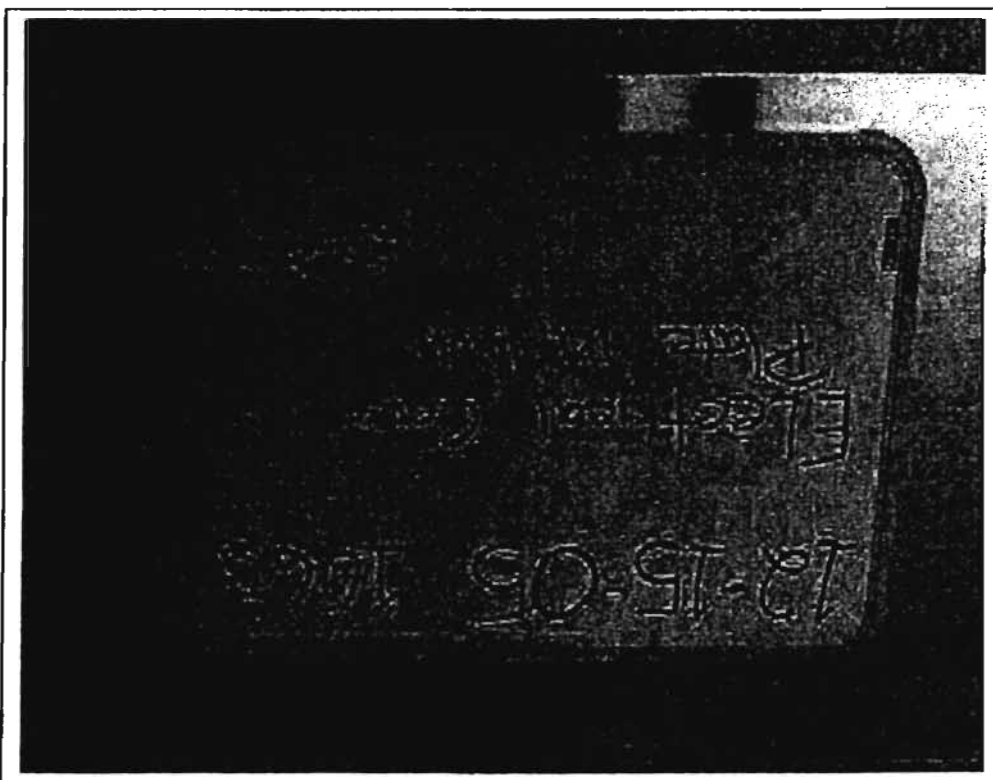
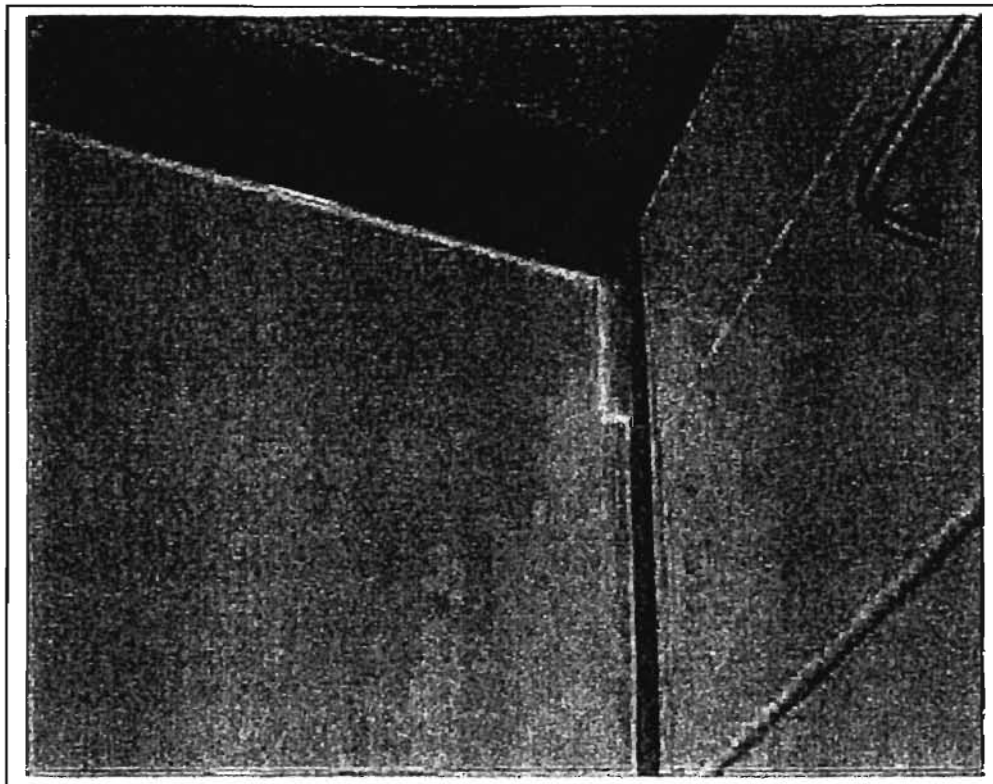


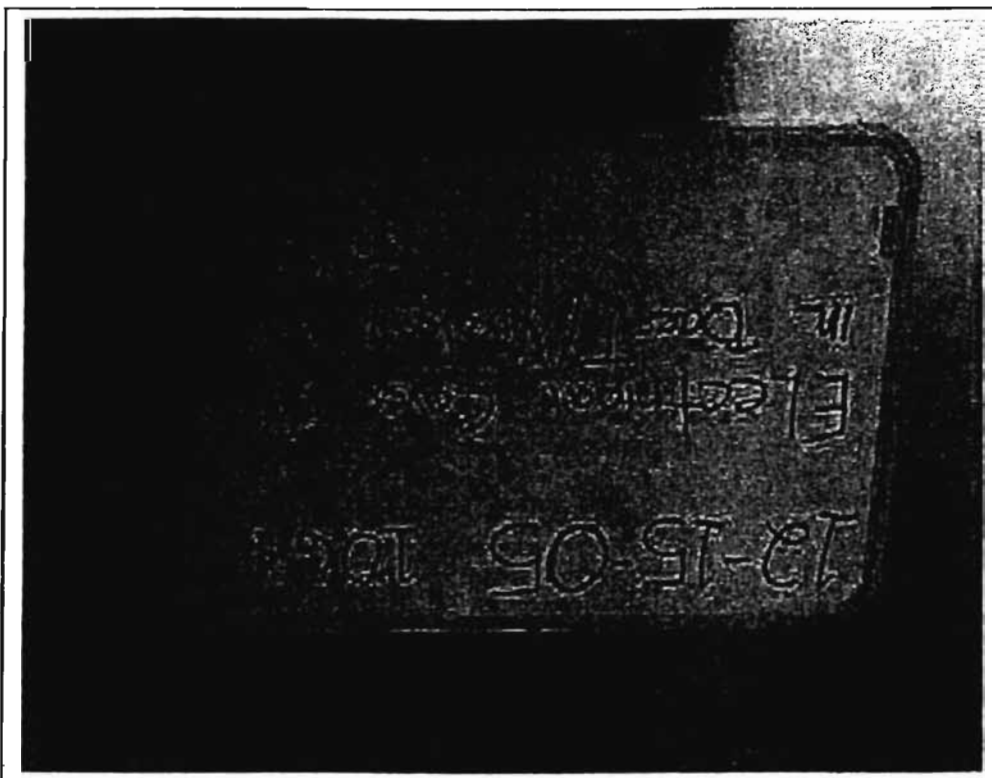
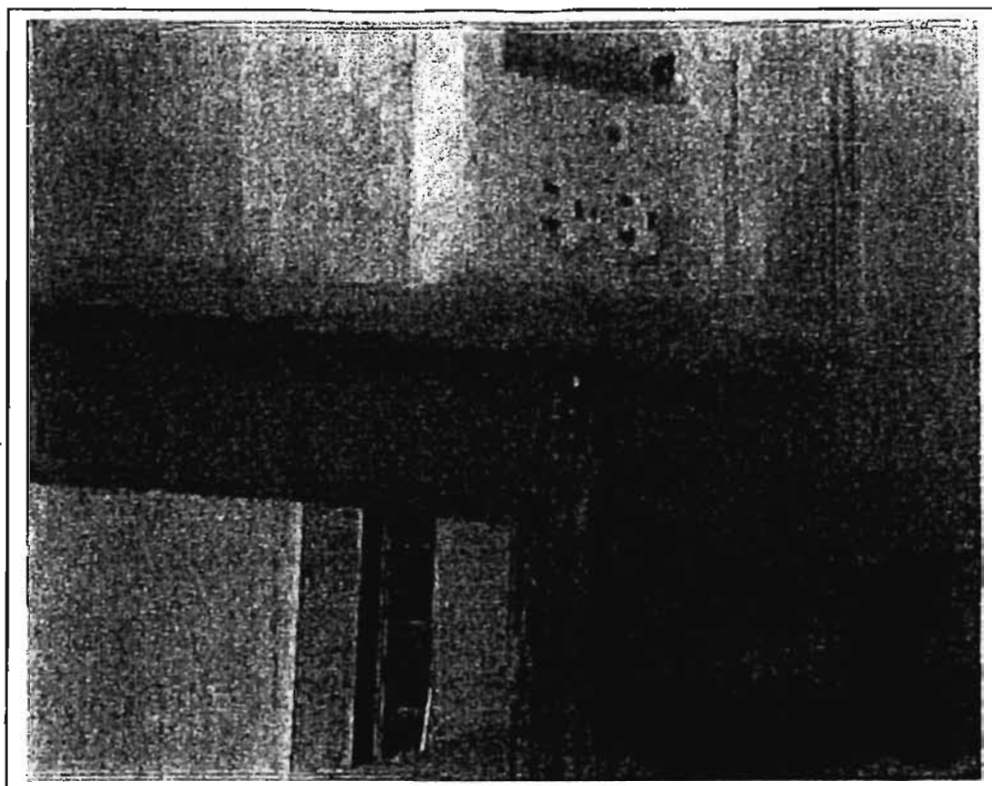


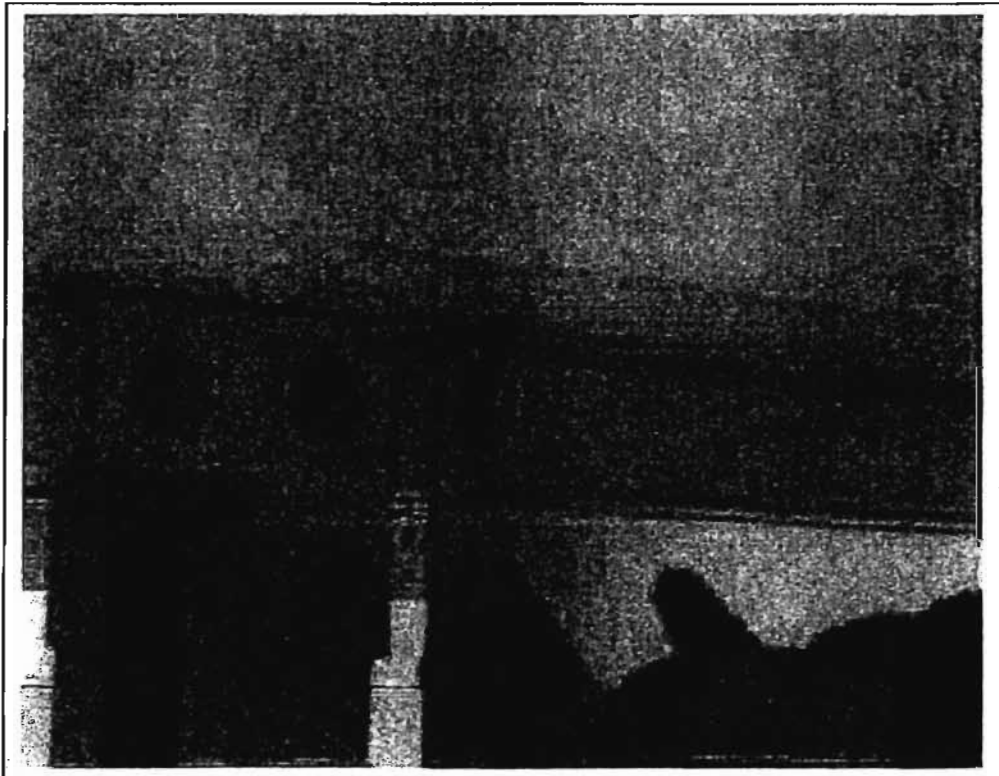
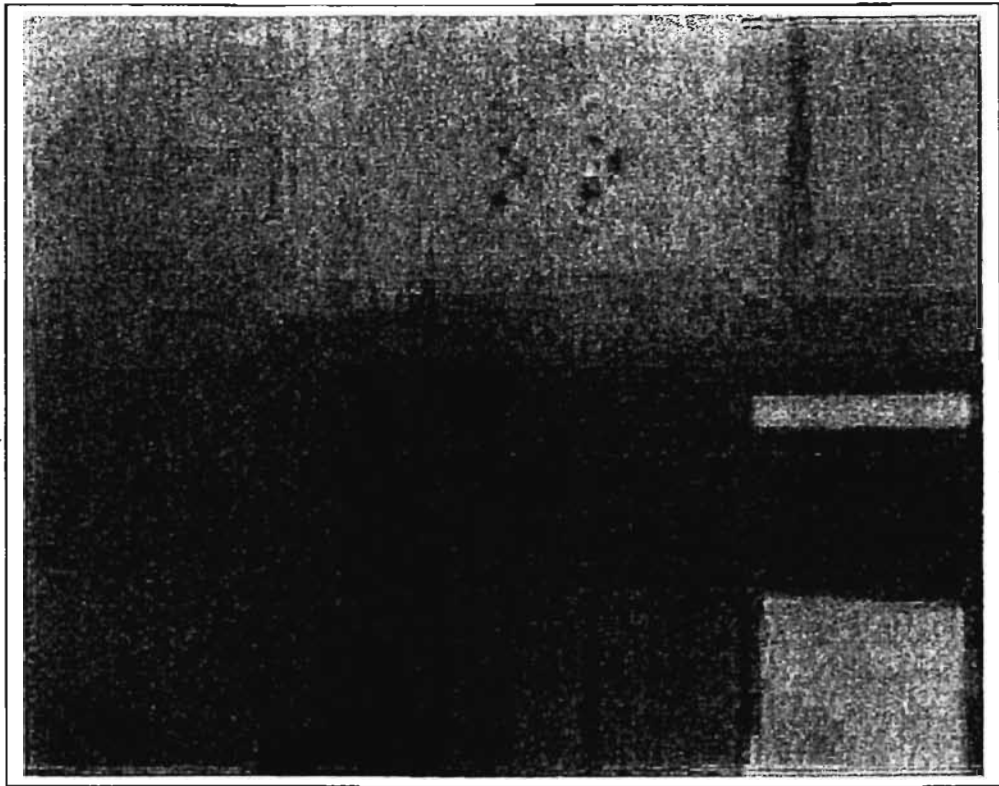


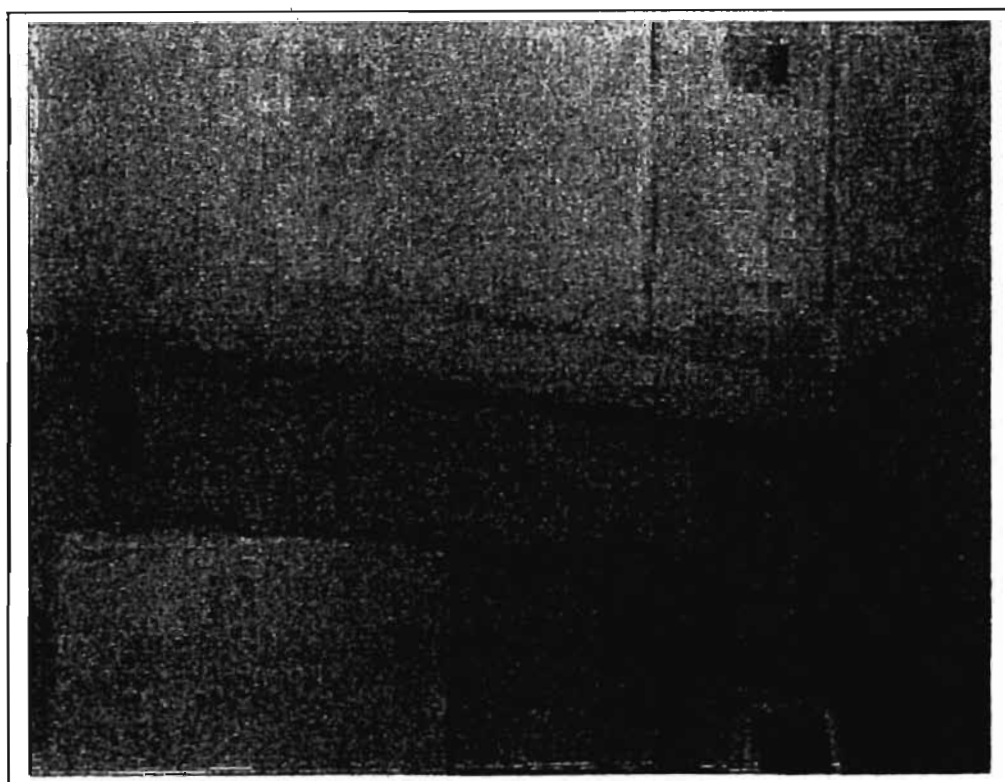


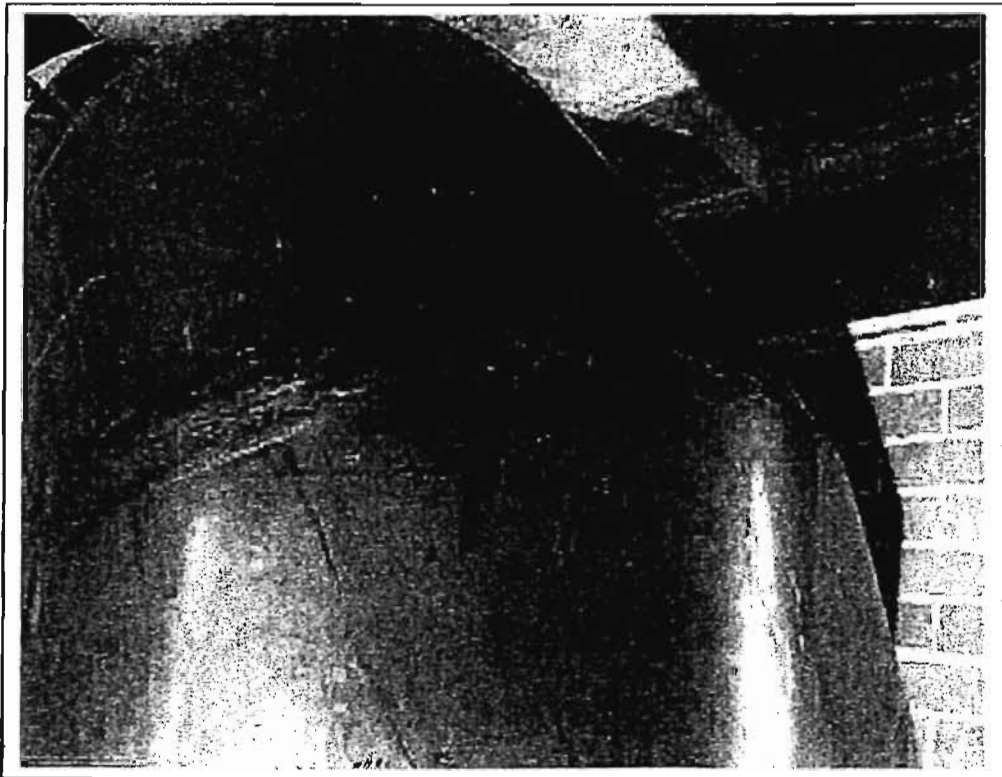
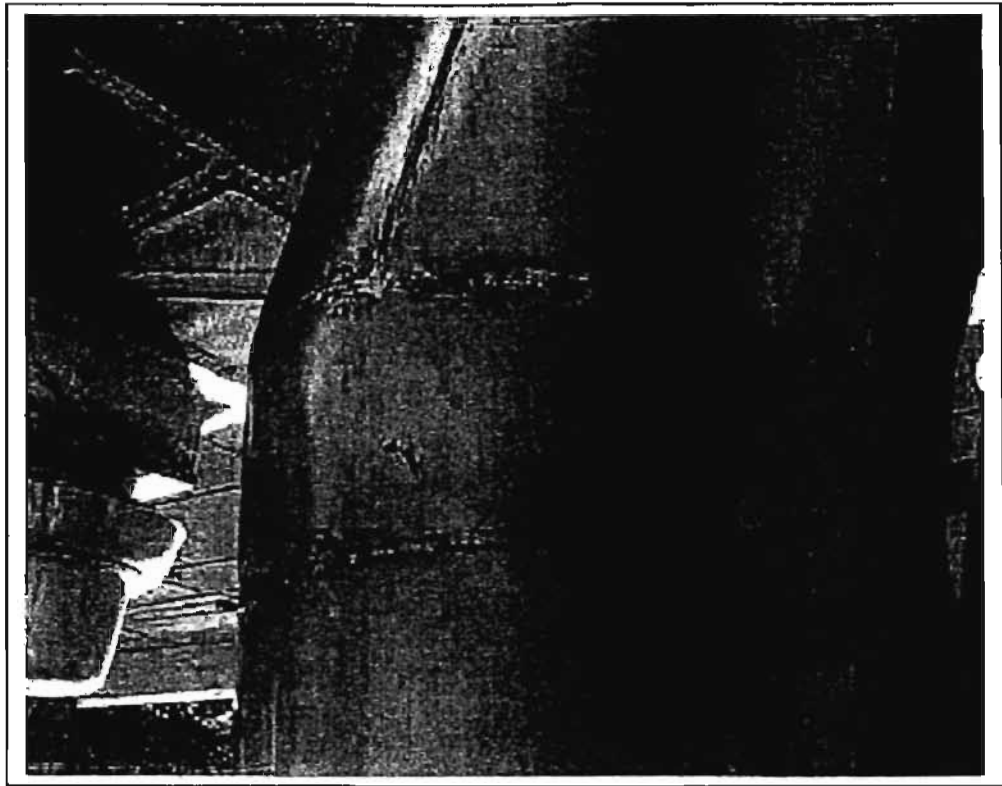


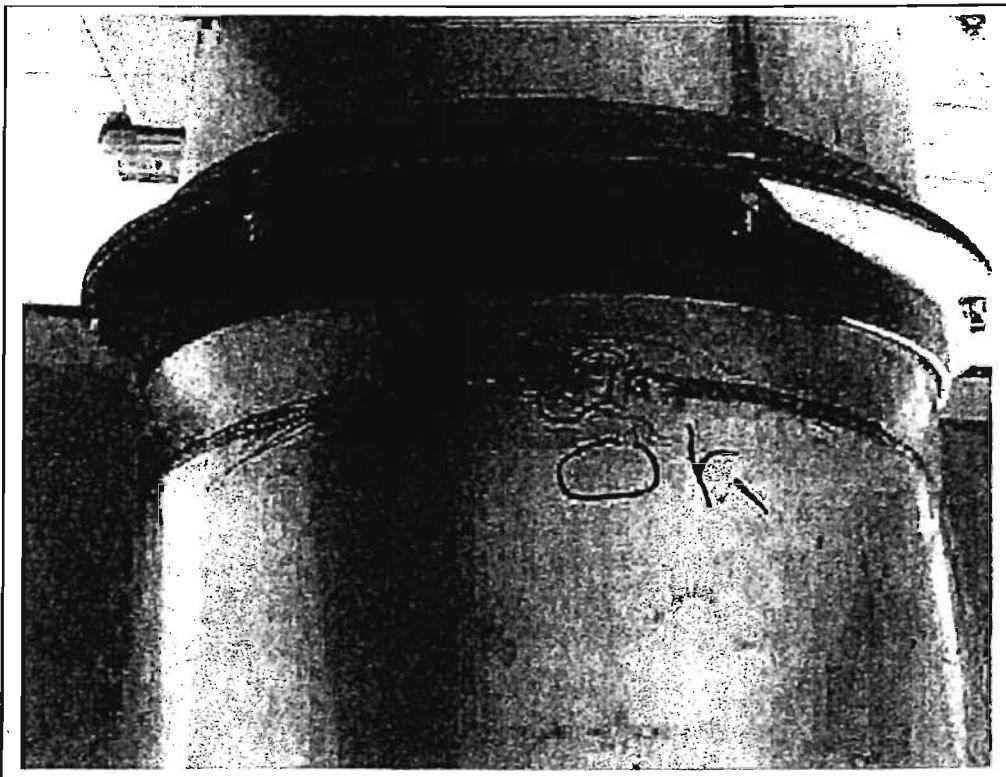
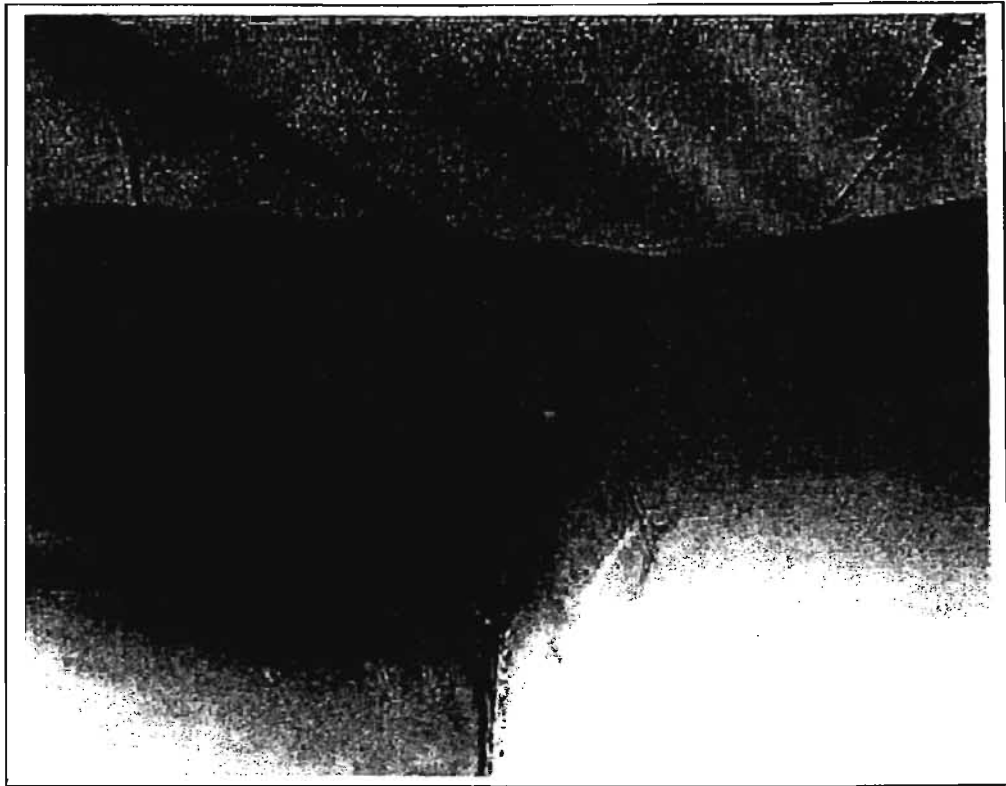


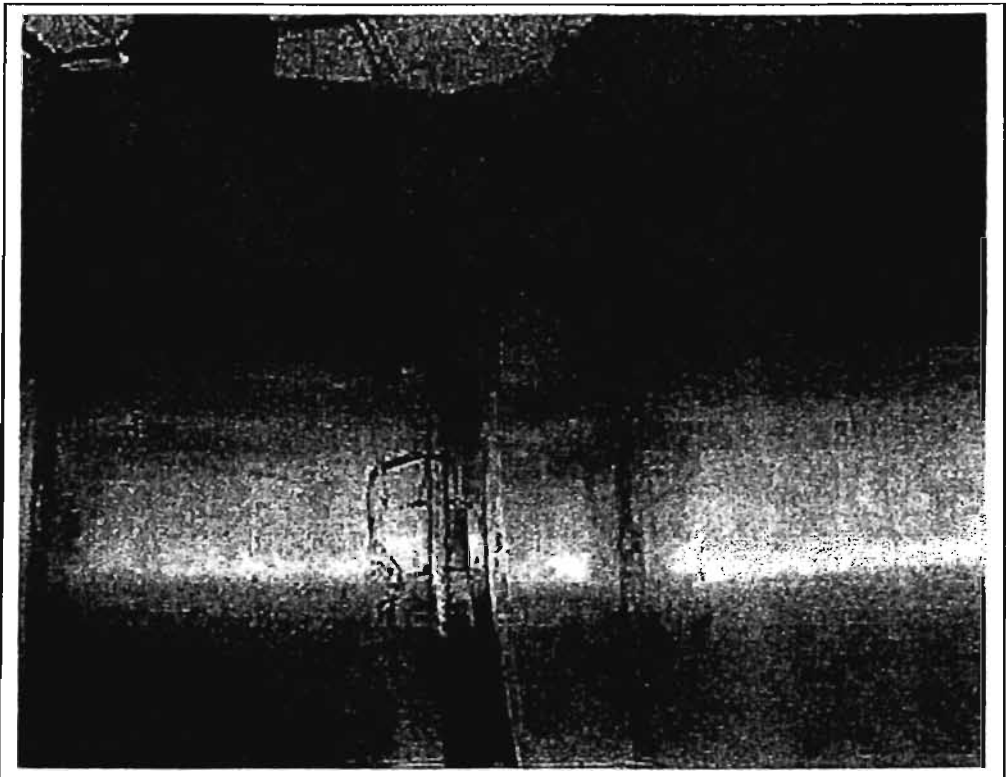


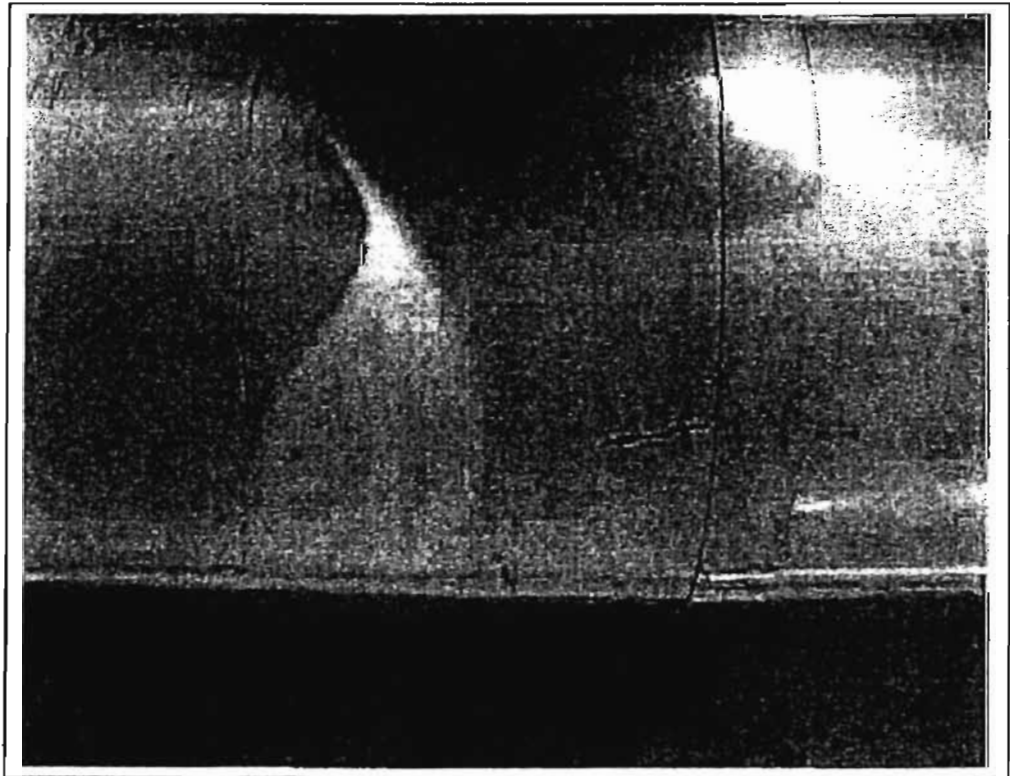
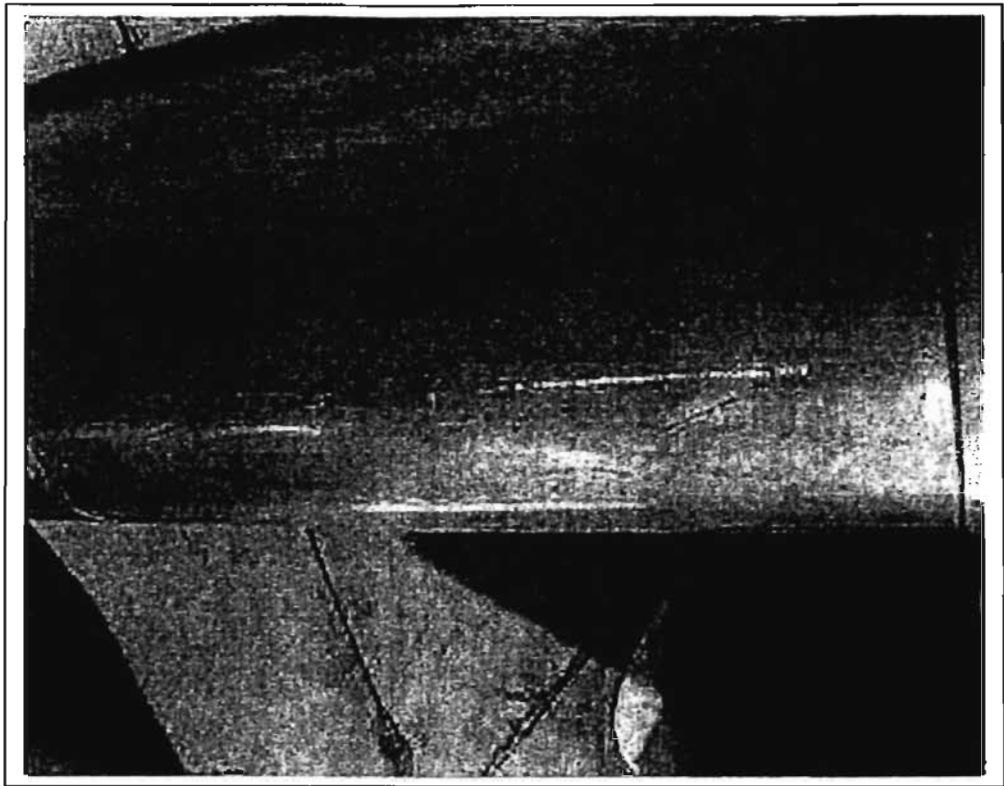


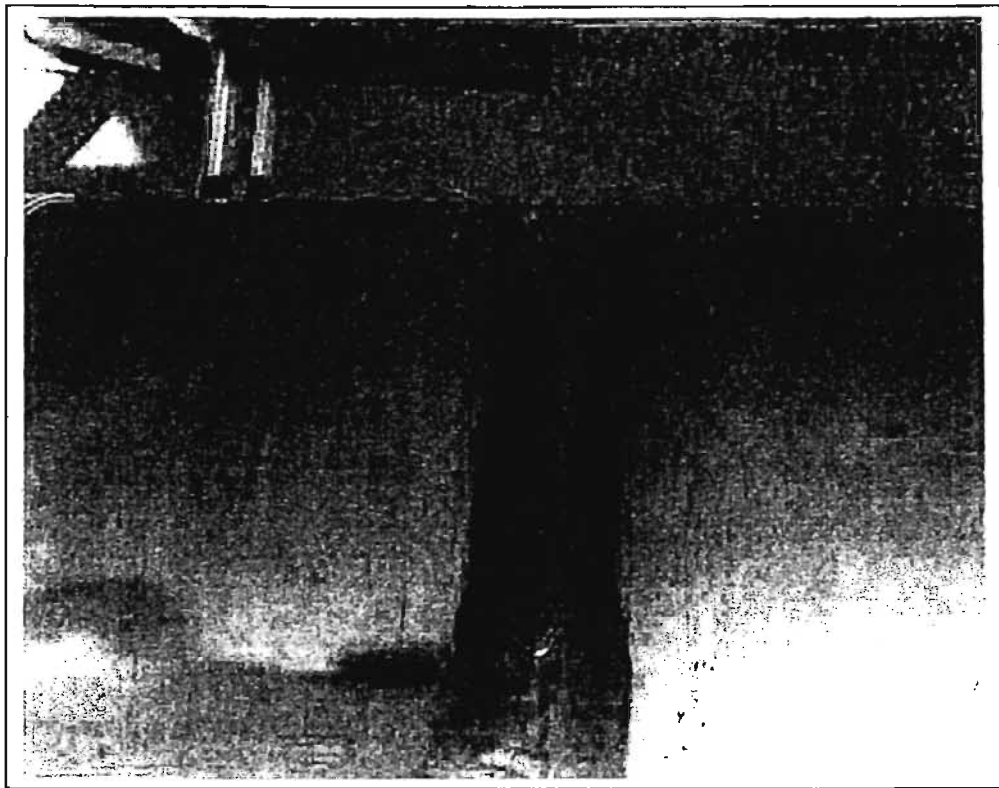


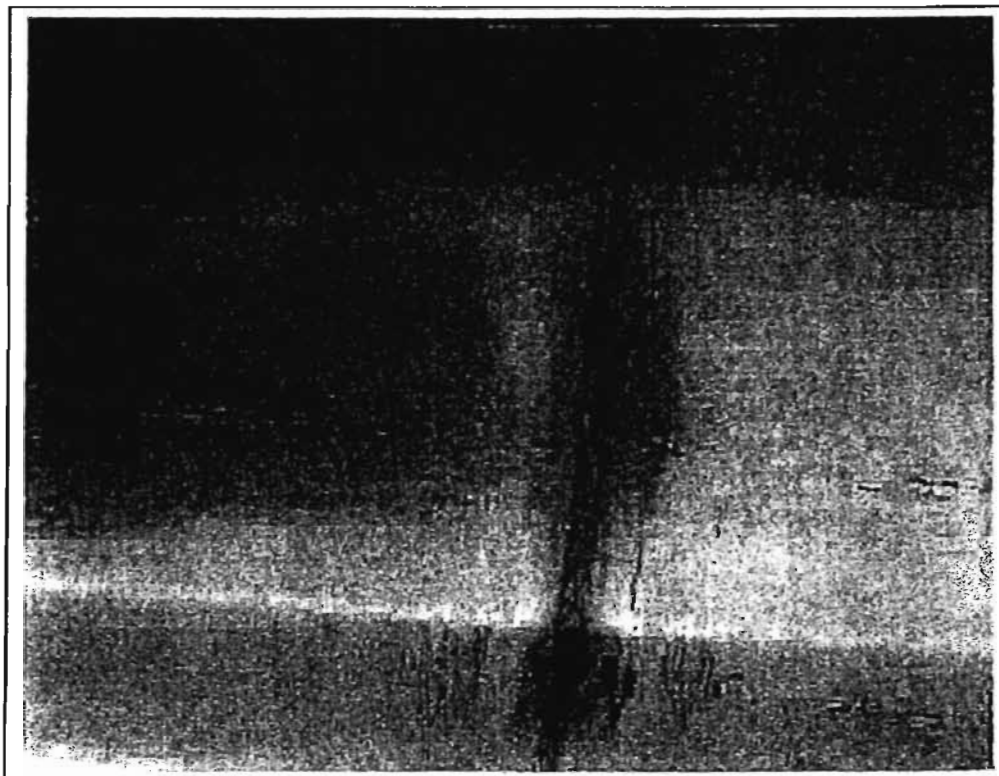
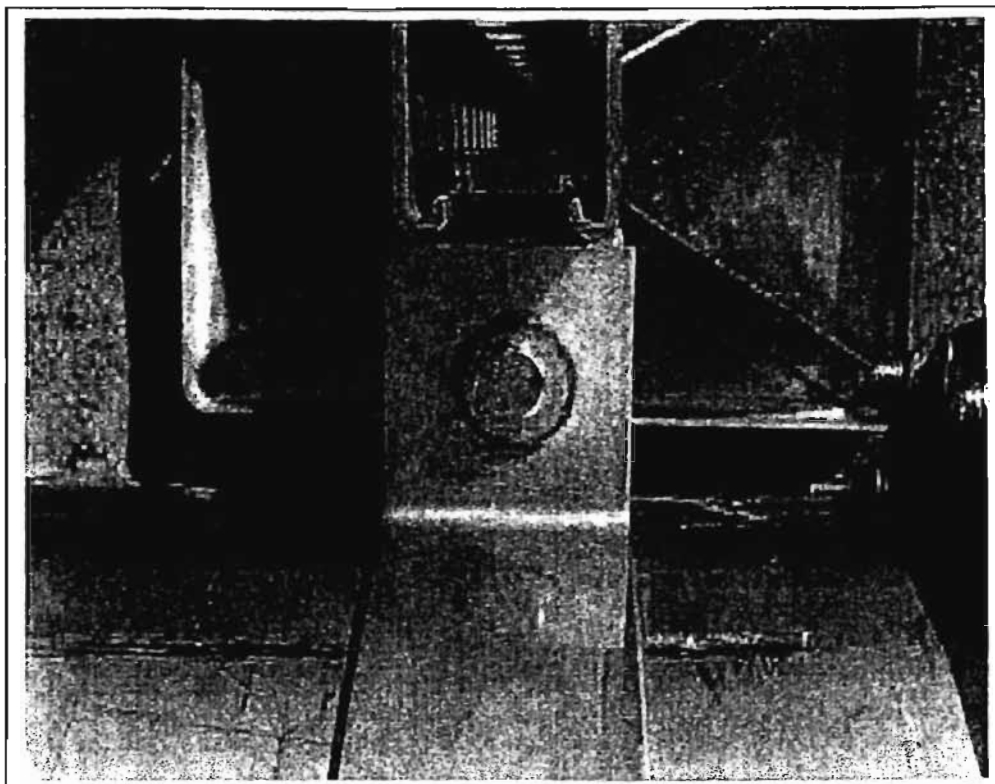


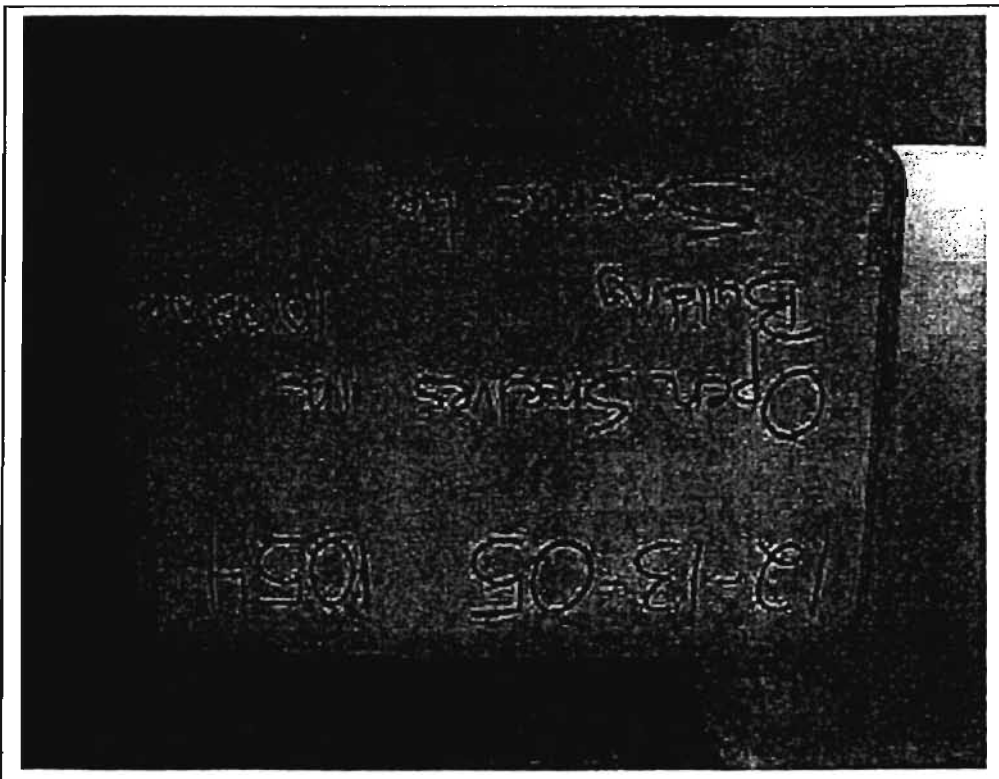
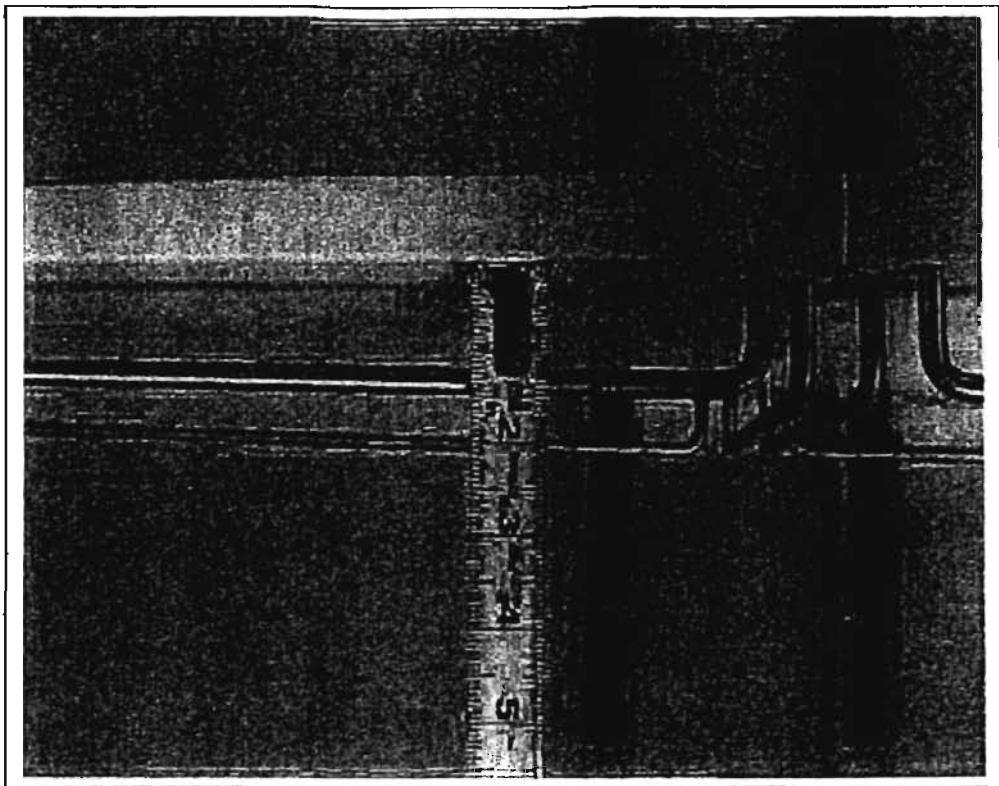


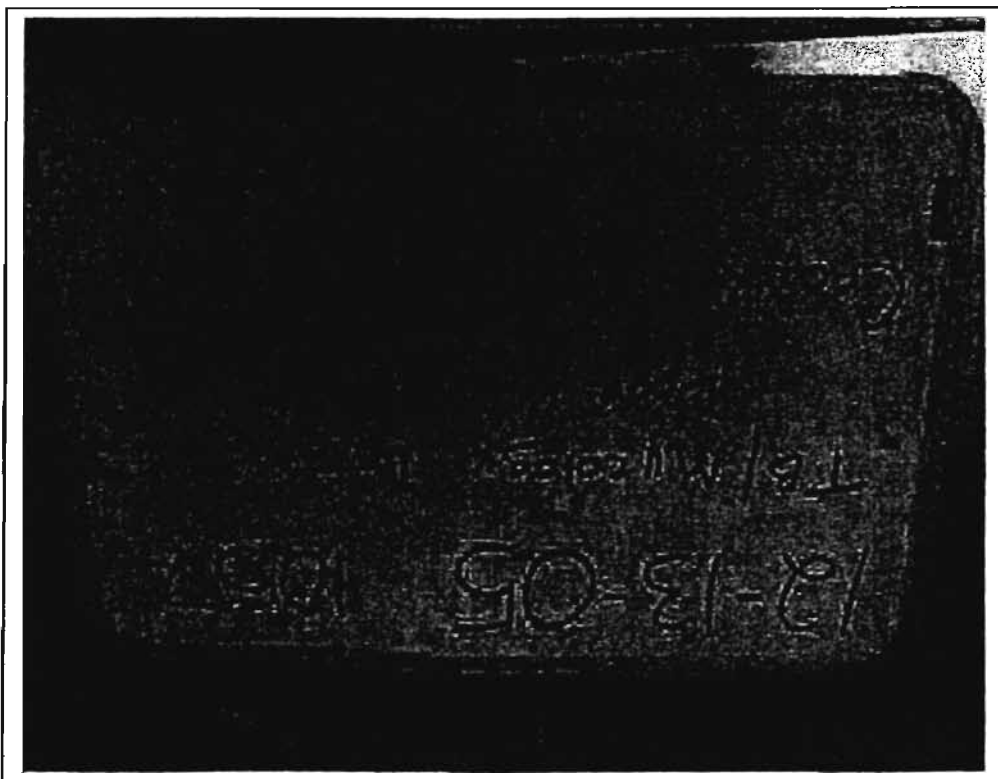
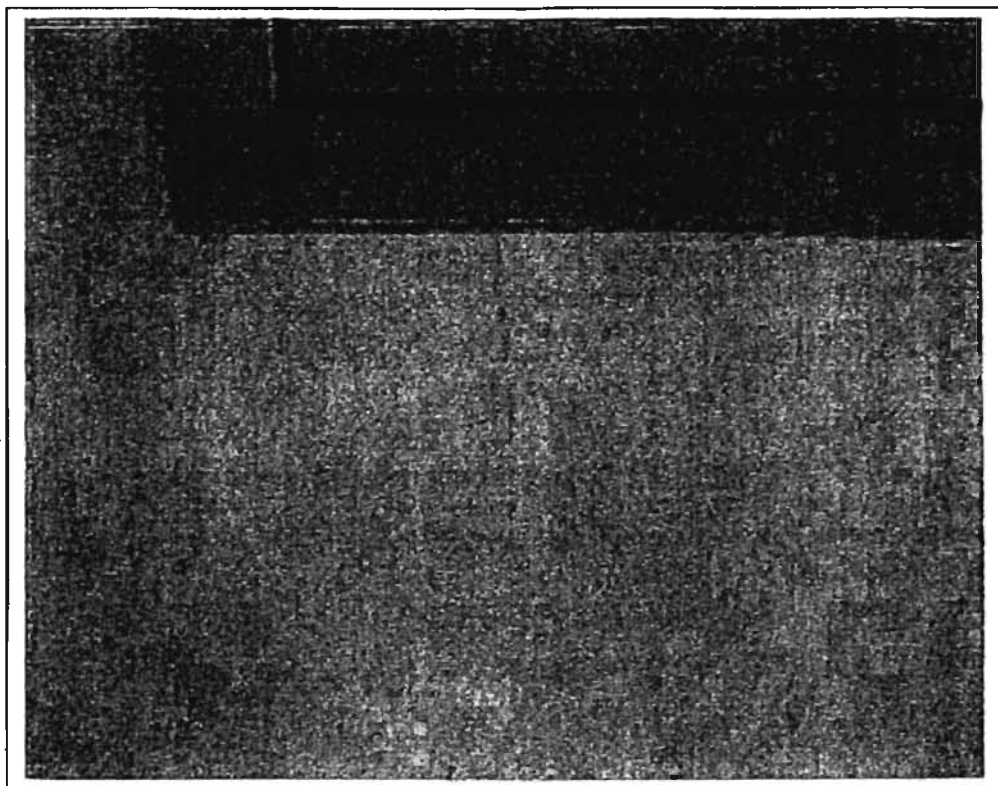


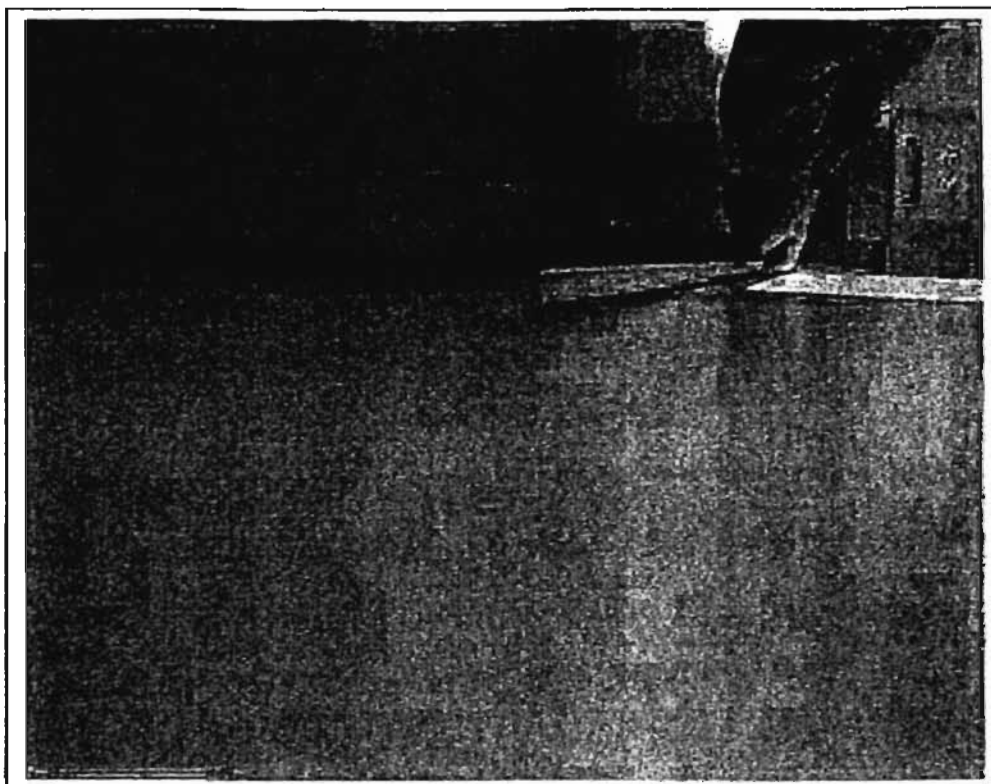


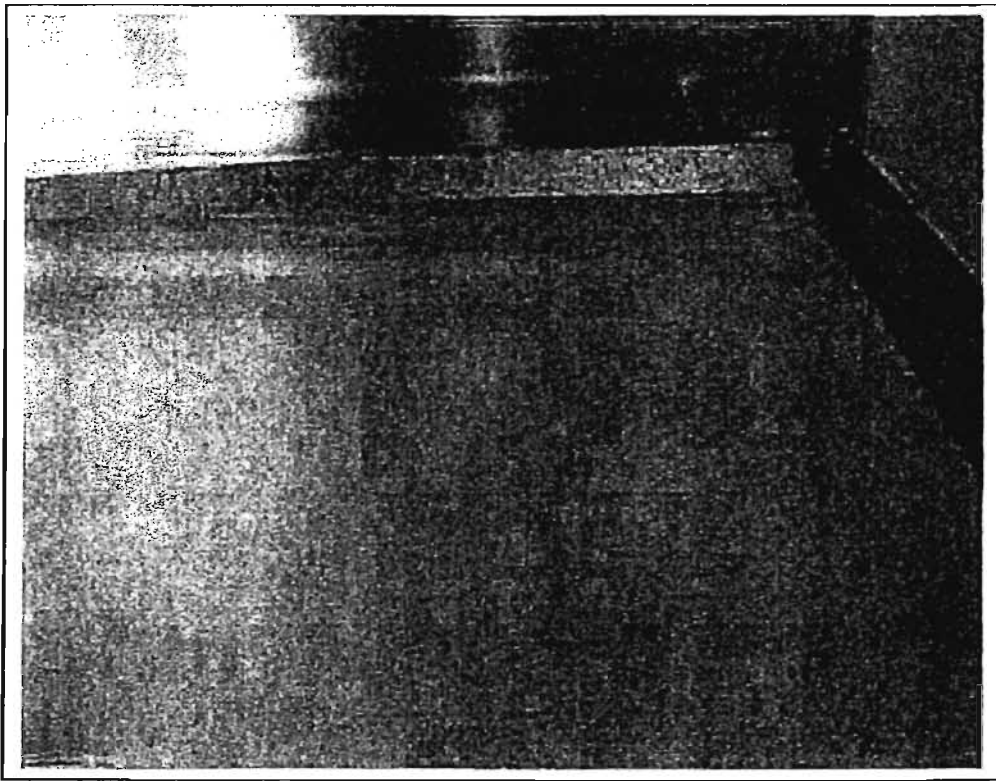
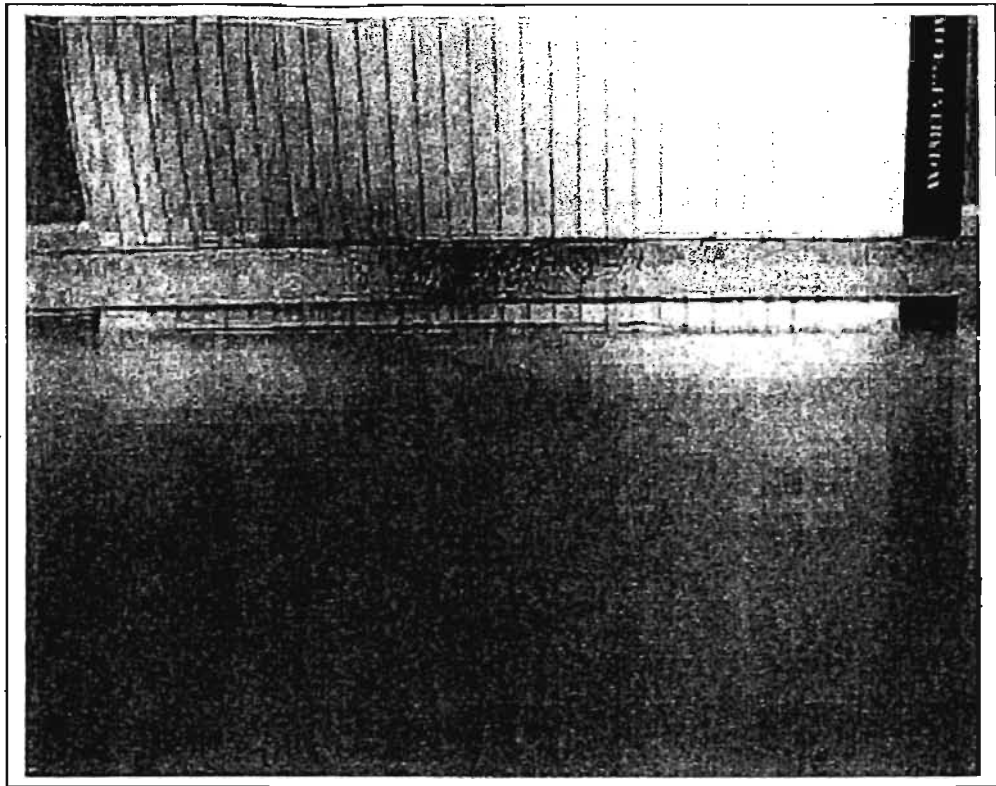


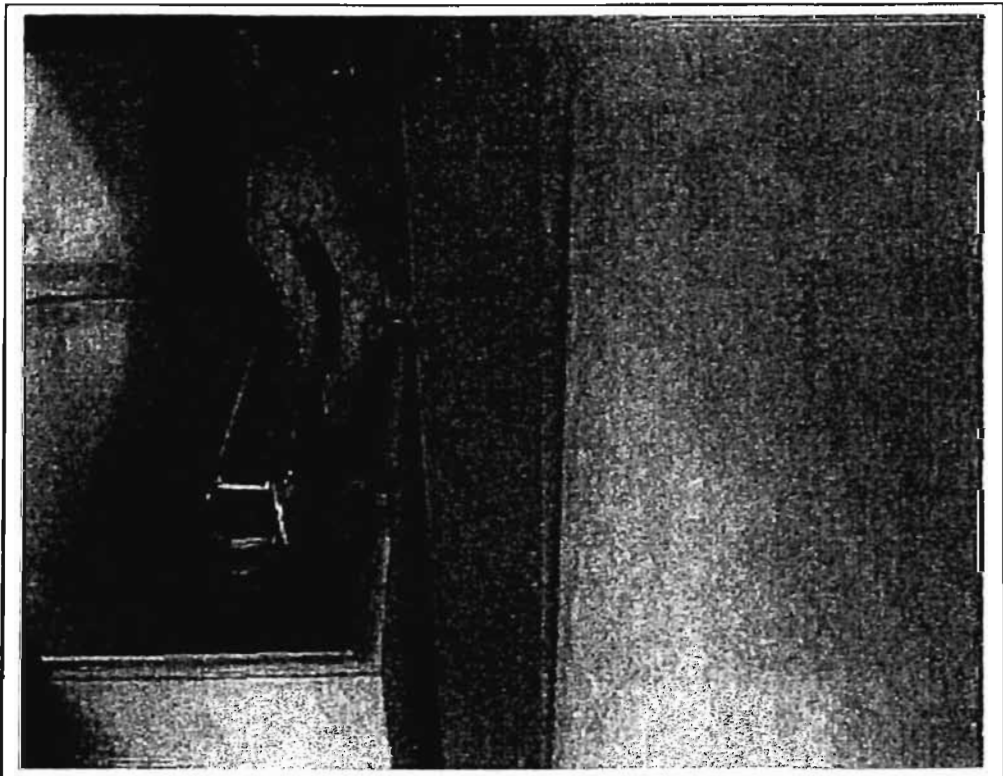
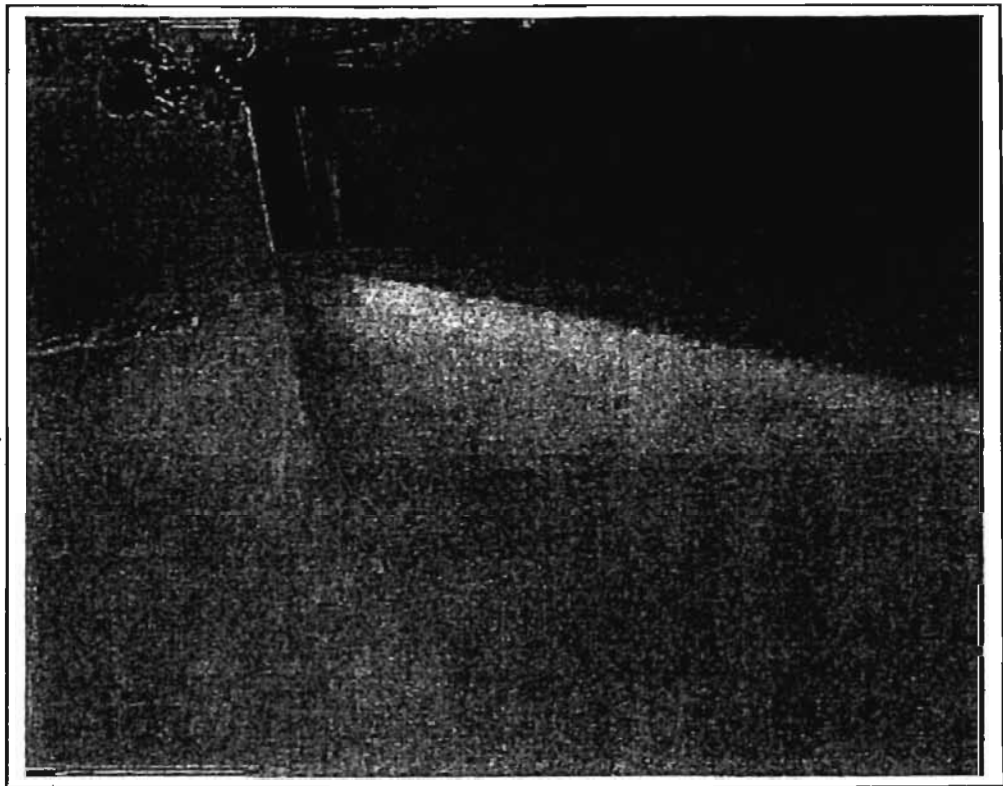


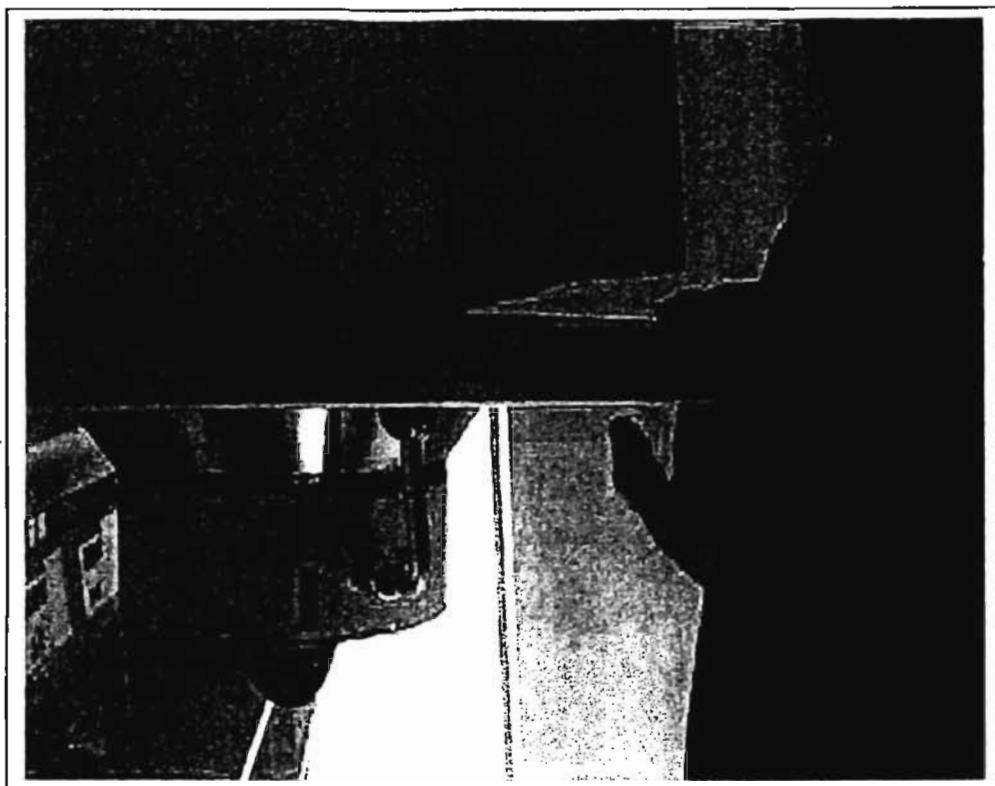


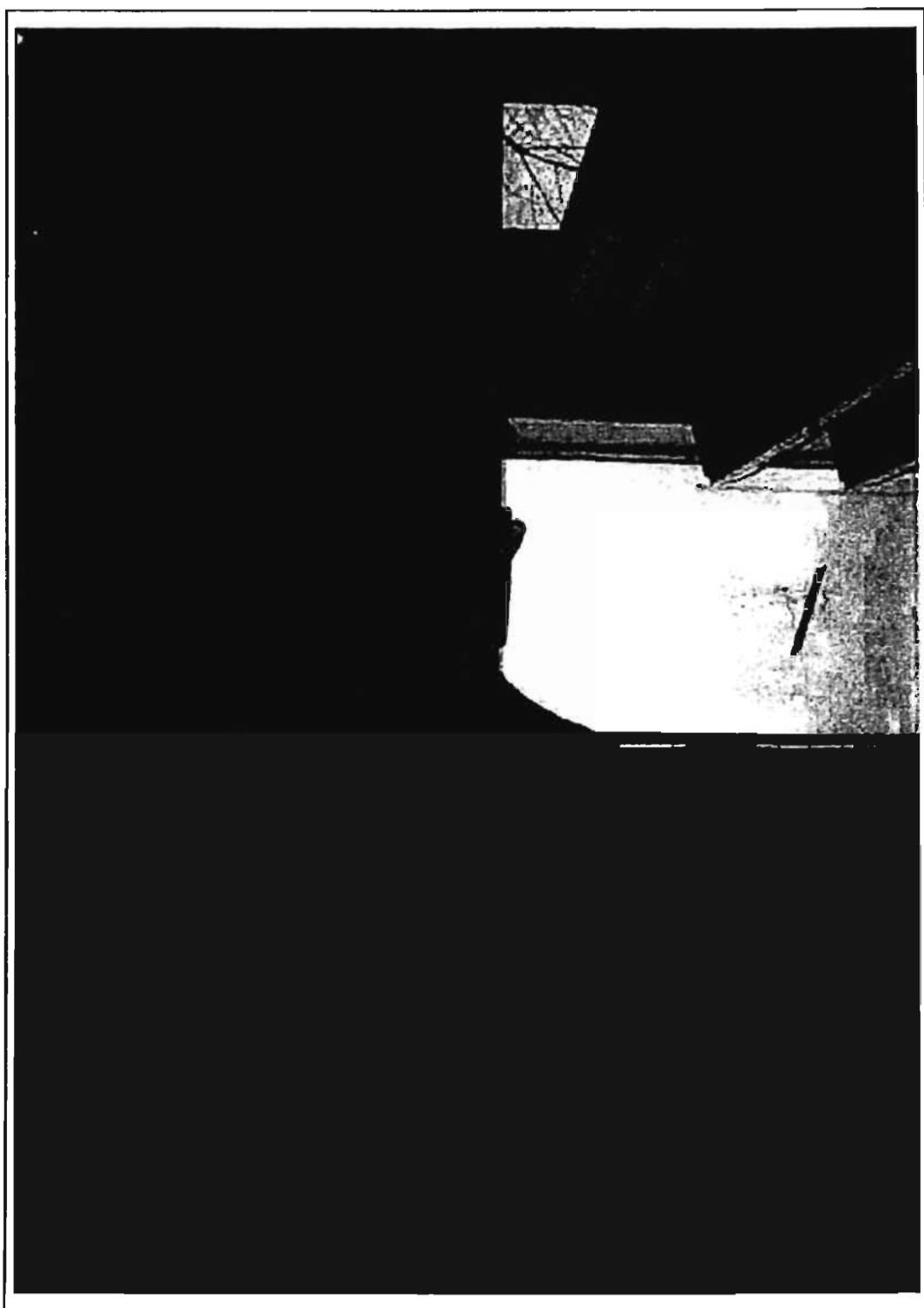


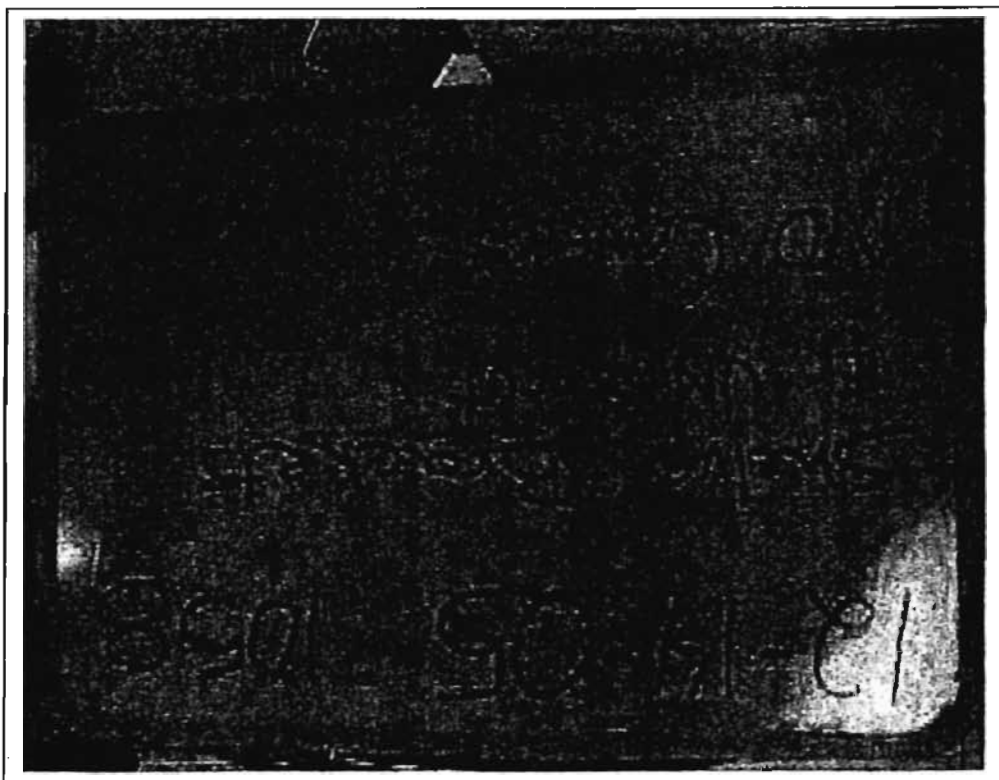
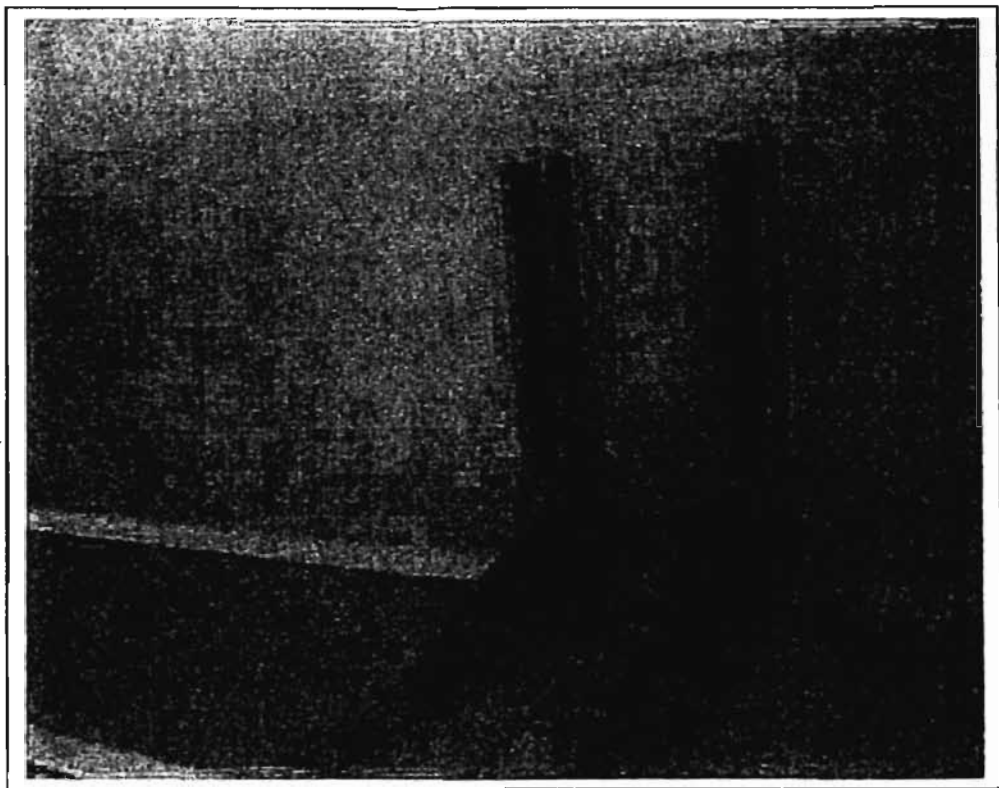


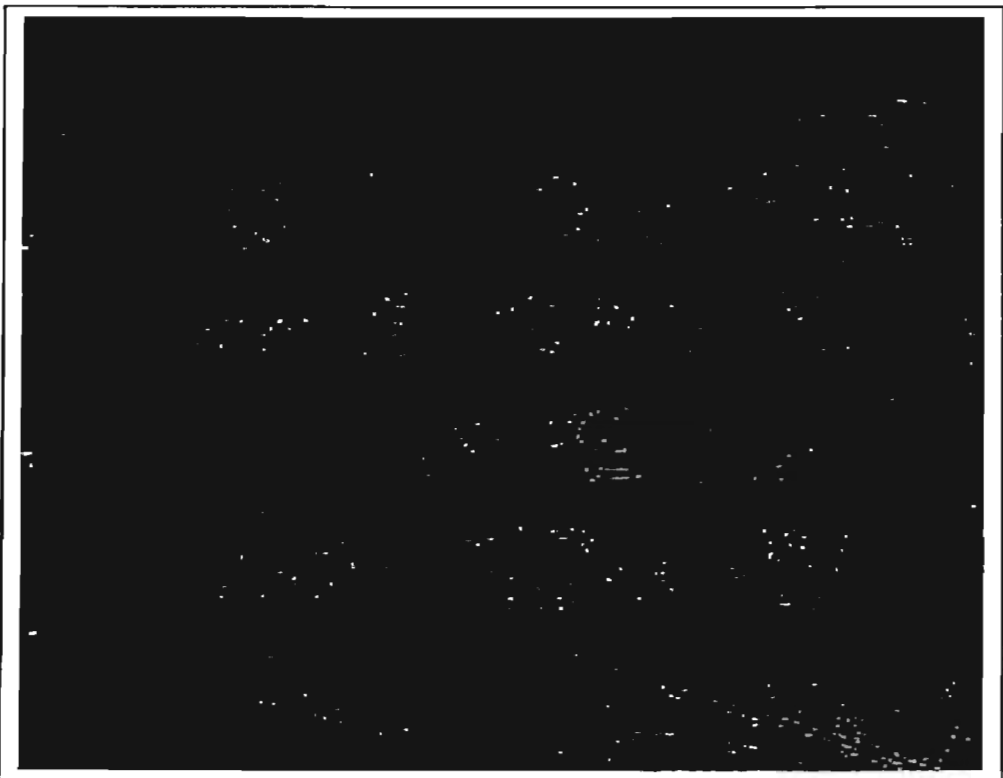
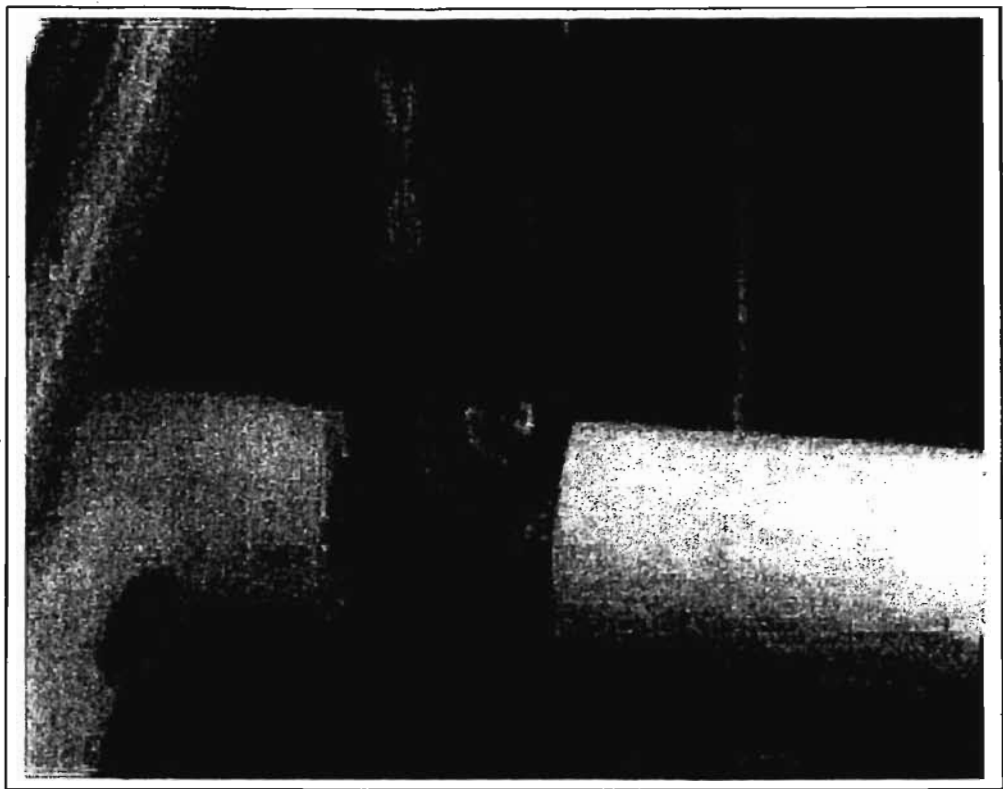


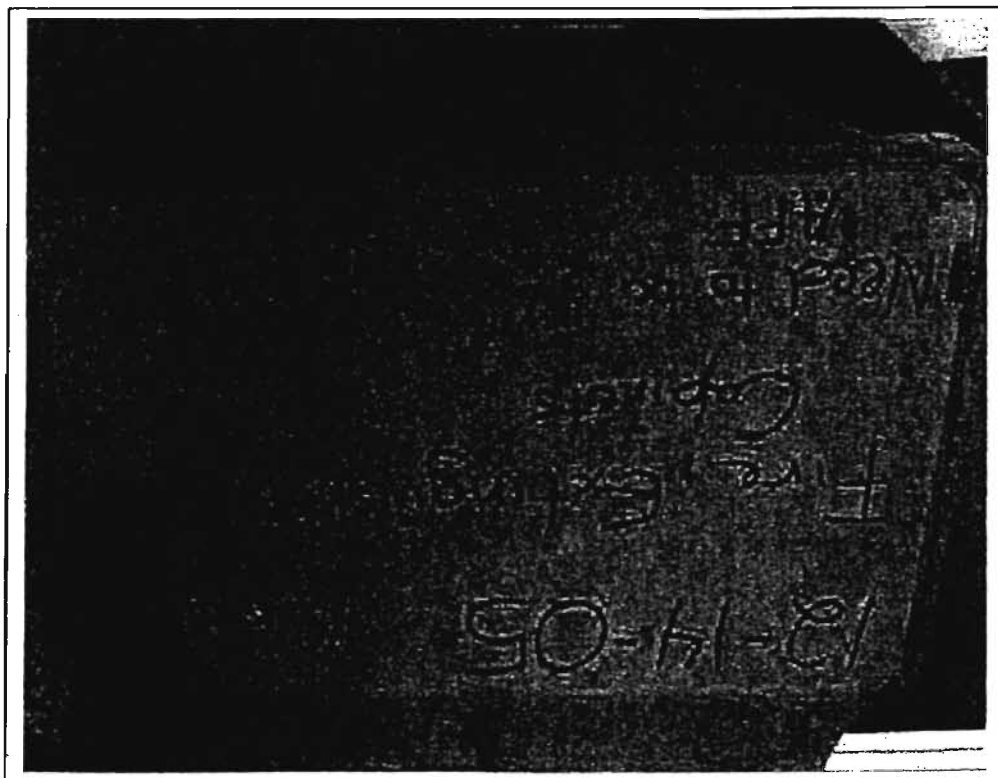
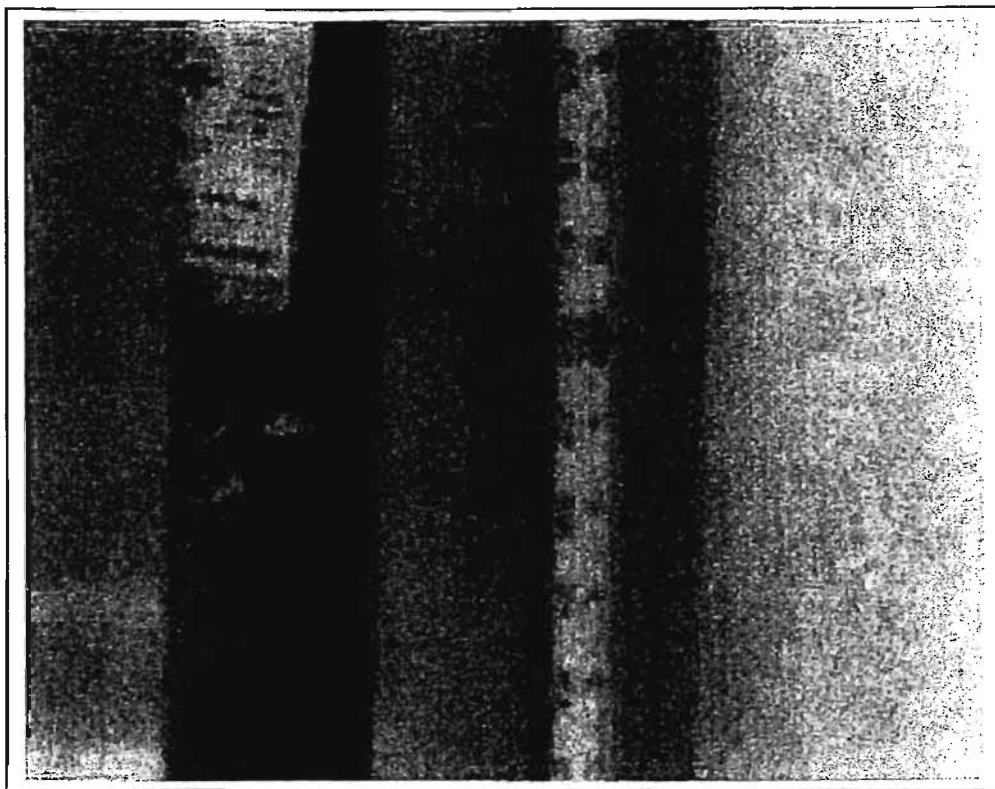


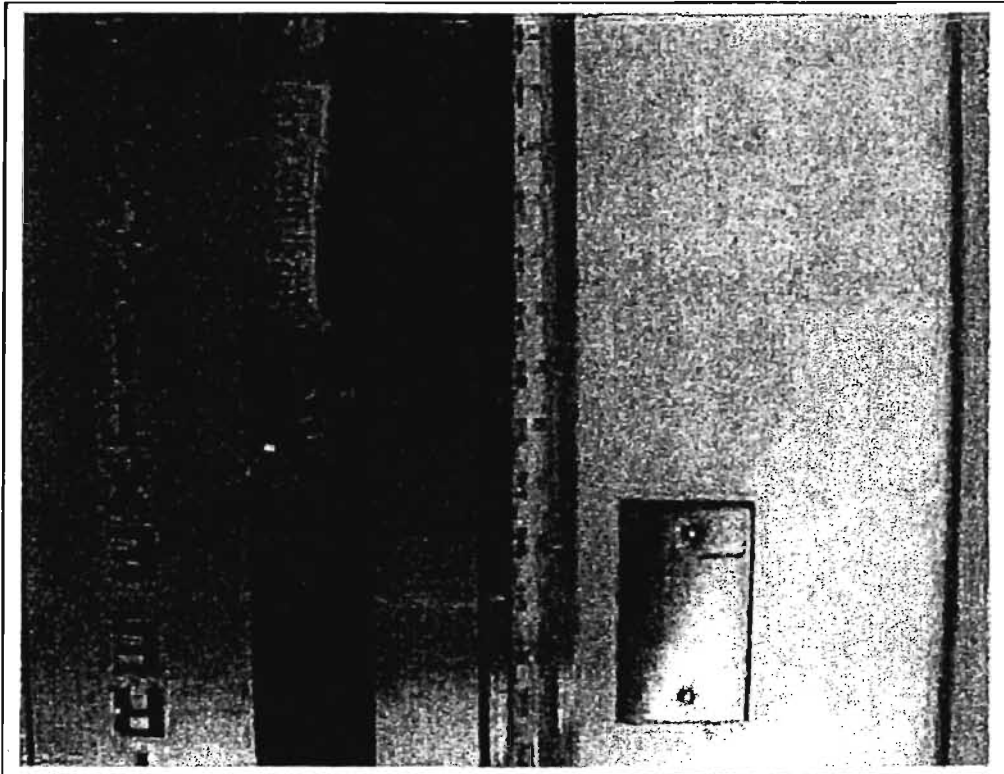
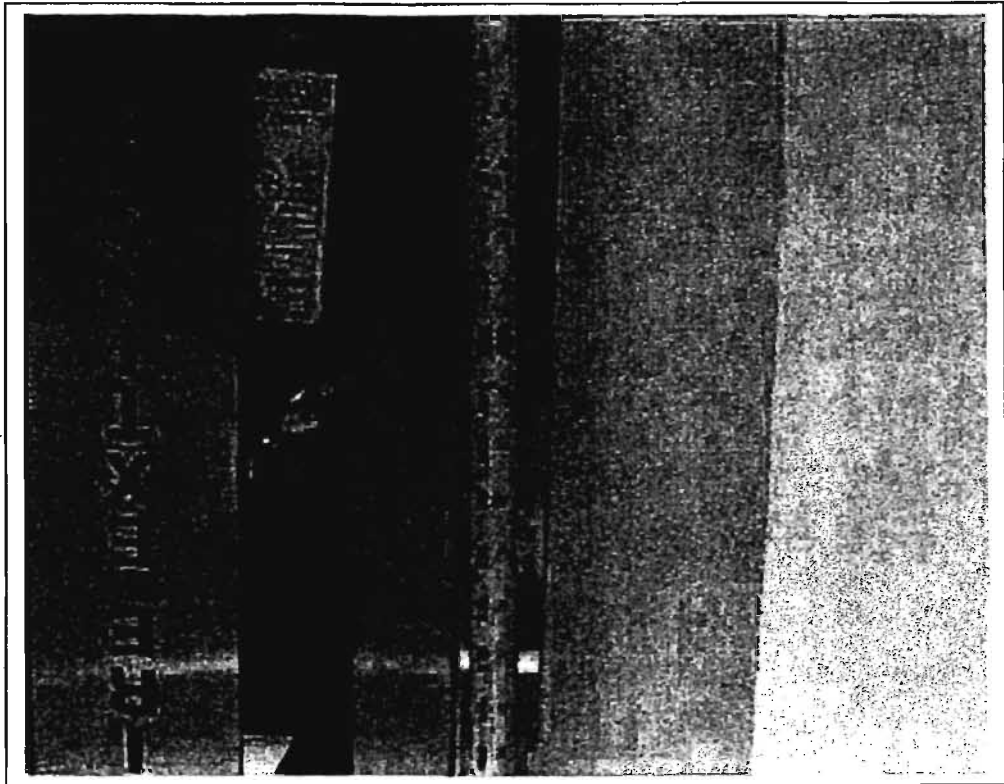








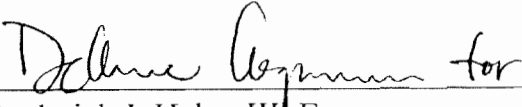




that it complied with the provisions of Supplemental Conditions 4.3.1 and 4.3.2, the Court should enforce the plain language of the parties' Contract. DPW waived its claims and Summary Judgment should be ordered dismissing DPW's claims.

IV.
CONCLUSION

SE/Z respectfully submits that the Contract sets forth clear and unambiguous conditions precedent under the Contract. Pursuant to Rule 56 of the Idaho Rules of Civil Procedure and the Idaho Supreme Court's decision in *Foster v. Traul*, 141 Idaho 590, 120 P.3d 278 (2005), SE/Z is entitled to summary judgment in this matter, because DPW cannot submit credible and admissible evidence that it complied with the conditions precedent under the Contract.

 for

Frederick J. Hahn, III, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Dated: 10/25/06

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 25th day of October, 2006.

DOCUMENT SERVED: **MEMORANDUM IN SUPPORT OF SE/Z
CONSTRUCTION, LLC 'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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Attorneys for Defendants State of Idaho, Ken Gardner, David Rooke,
Jan Frew, Larry Osgood, Chris Motley, and Elaine Hill

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho)	
corporation,	)	Case No. CV OC 0508037
)	
Plaintiff,	)	[Consolidated with Case No. CV OC 06-
v.	)	00191]
)	
SE/Z CONSTRUCTION, LLC, an Idaho limited	)	DEFENDANT STATE OF IDAHO'S
liability company; and STATE OF IDAHO,	)	OPPOSITION TO SE/Z
acting by and through its Department of	)	CONSTRUCTION, LLC'S MOTION
Administration, Division of Public Works,	)	FOR PARTIAL SUMMARY
	)	JUDGMENT AND PLAINTIFF
Defendants,	)	HOBSON FABRICATING CORP.'S
	)	JOINDER IN SE/Z'S MOTION
)	

NO. _____
FILED _____
AM _____
NOV 10
J. DAVID N. _____, Clerk
By ABBY TEEL
DEPUTY

STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works,)

Counter-Claimant,)

v.)

HOBSON FABRICATING CORP., an Idaho)
corporation,)

Counter-Defendant,)

SE/Z CONSTRUCTION, LLC, an Idaho limited)
liability company,)

Cross-Claimant,)

v.)

STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works,)

Cross-Defendant,)

STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works,)

Counter-Cross-Claimant,)

v.)

SE/Z CONSTRUCTION, LLC, an Idaho limited)
liability company,)

Counter-Cross-Defendant.)

STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works)

Third-Party Plaintiff,)

v.)

RUDEEN & ASSOCIATES, A
PROFESSIONAL COMPANY, an Idaho
limited liability company,

Third-Party Defendant.

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

v.

KEN GARDNER, an individual; DAVID
ROOK, an individual; JAN FREW, an
individual; LARRY OSGOOD, an individual;
CHRIS MOTLEY, an individual; and ELAINE
HILL, an individual,

Defendants,

Case No. CV OC 06-00191

COMES NOW defendant the State of Idaho, Department of Administration, Division of Public Works ("the State"), by and through its undersigned counsel of record, and hereby submits its Opposition to SE/Z Construction, LLC's Motion for Partial Summary Judgment and Plaintiff Hobson Fabricating Corp.'s Joinder in SE/Z's Motion.

INTRODUCTION

This case arises out of work performed by the general contractor SE/Z Construction, LLC ("SE/Z") and its mechanical sub-contractor Hobson Fabricating Corp. ("Hobson") on "DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3" ("the Project"), involving the construction of a Level 3 Bio-Safety Lab ("BSL-3") in Boise, Idaho. SE/Z and Hobson, seeking partial summary judgment as to the State's counter cross-claims against SE/Z and counter-claims against Hobson in this matter (hereinafter collectively referred to as "counter-claims"), ignore complex factual issues that render inappropriate dismissal of the State's counter-

claims. For the reasons discussed below, the State respectfully requests that this Court deny Hobson's and SE/Z's Motions.

FACTUAL BACKGROUND

On or about July 1, 2003, the State entered into a contract ("the Contract") with SE/Z, whereby SE/Z agreed to serve as the general contractor on the Project, involving construction of a BSL-3 in Boise, Idaho. (Complaint ¶ 6.) The BSL-3, once constructed, was intended to serve as a facility capable of handling extremely dangerous substances, such as anthrax or avian flu virus, enabling the State to analyze and contain such substances. (Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's [First] Motions for Partial Summary Judgment ("First Hill Aff.") ¶ 2);¹ (Affidavit of Albert F. Munio in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's [First] Motions for Partial Summary Judgment ("Munio Aff."), ¶ 10); (Affidavit of Joe Rutledge in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's [First] Motions for Partial Summary Judgment ("Rutledge Aff."), ¶ 8.) Because of the unique purpose of the BSL-3, it was absolutely critical that the facility be constructed correctly, as specified by the construction documents, to ensure that the substances handled in the BSL-3 would not endanger employees of the laboratory or the surrounding citizenry. (See Munio Aff. ¶ 10.)

On or about August 25, 2003, SE/Z signed a Subcontract Agreement ("the Subcontract") with Hobson, whereby Hobson agreed to perform mechanical work on the Project as a subcontractor under SE/Z. (Complaint, ¶ 8.) The mechanical work on the Project was the most critical component for the safe operation of the facility, as it involved the exhaust systems, which

¹ The Affidavits referring to SE/Z's and Hobson's "First" Motions for Partial Summary Judgment were filed with this Court on or about May 23, 2006.

were intended to filter and capture the dangerous substances handled in the BSL-3 and to prevent them from being released into the laboratory or the atmosphere. (First Hill Aff. ¶ 9); (Munio Aff. ¶ 10.) Work on the Project commenced in approximately September 2003, with an anticipated completion date of May 26, 2004. (First Hill Aff. ¶ 3); (Affidavit of Jan Frew in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's [First] Motions for Partial Summary Judgment ("Frew Aff."), ¶ 2.) However, to date, the Project has yet to be completed. (Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to SE/Z Construction, LLC's Motion for Partial Summary Judgment and Plaintiff Hobson Fabricating Corp.'s Joinder in SE/Z's Motion ("Second Hill Aff."), ¶ 2.)

Various issues with SE/Z's and Hobson's workmanship arose during the Project. For example, in approximately January 2004, the State and the Architect's sub-consultant engineer on the Project, Traci Hanegan, discovered that Hobson had installed an inferior grade of stainless steel with respect to the ductwork. (First Hill Aff. ¶ 4); (Frew Aff. ¶ 3); (Rutledge Aff. ¶ 3.)

In approximately April 2004, the Architect's sub-consultant on the Project, Traci Hanegan, expressed concerns about the welding performed on the ductwork. An independent certified welding inspector, Norm Daneri, identified various deficiencies with the welding performed on the ductwork. Based on these concerns, and because SE/Z had represented it was about to sheetrock the ceilings covering the ductwork, the State issued a Stop Work Order, directing the Contractor, or its subcontractor, to cease "welded stainless steel exhaust duct work and any other work that may affect the Contractor's ability to remove and/or remedy deficiencies in welded seams and joints of stainless exhaust duct work." (Second Hill Aff., ¶¶ 3, 4 and 5 and Exs. A, B and C (3/30/04 Monthly Construction Progress Meeting Minutes, Ex. A; Welding

Daneri, Ex. B; and Stop Work Order, Ex. C.) In addition, the State retained another independent certified welding inspector, Mark Bell, who inspected Hobson's welds on the ductwork, first in May 2004 and again in August 2004. The second inspection included inspection of duct work by Hobson to address the defects identified during the first inspection. (First Hill Aff. ¶ 6 and Ex. D); (Frew Aff. ¶ 4); (Rutledge Aff. ¶ 4); (Second Hill Aff., Exs. D, F (Inspection Reports of Mark Bell.) Mr. Bell discovered on both occasions that Hobson had performed reckless welding. (Id.) Mr. Bell noted in his Report of August 2004 that Hobson had failed to correct the welds noted as deficient in his May 2004 report. (Second Hill Aff., Ex. F.) Between April 2004 and August 2004, Hobson was instructed to fix deficient welds in at least three (3) documents – two (2) Architect's Supplemental Instructions and one (1) change order. (Second Hill Aff., Exs. E, G and H.) On approximately August 24, 2004, SE/Z provided the State a letter signed by a certified welding inspector chosen by Hobson, John Cooley, stating that all welding had been completed in accordance with the agreed upon standard. (Second Hill Aff., Ex. I.) By this point in time, the Project was considerably delayed, due, in large part, to Hobson's actions. (First Hill Aff. ¶¶ 5, 7); (Frew Aff. ¶¶ 3, 5-6); (Rutledge Aff. ¶¶ 5-6.)

In early 2005, the Architect/Engineer on the Project, Rudeen and Associates ("Rudeen") sent its representatives, Robert Howard and Traci Hanegan,² to inspect the Project. Mr. Howard and Ms. Hanegan issued Field Observation Reports, noting numerous issues with work quality and incomplete work. (Second Hill Aff., Exs. K, L (Field Observation Reports).) The State directed SE/Z to address the identified issues. (Id. at Ex. R (Letter from Frew to Hayes, 2/18/05).)

In the Spring of 2005, the State discovered that Hobson had negligently failed to install dampers clearly specified in the construction documents. (First Hill Aff. ¶ 7); (Frew Aff. ¶ 5);

² Traci Hanegan was employed by Coffman Engineers, a sub-contractor of Rudeen.

(Rutledge Aff. ¶ 5.) These dampers were critical to the successful filtration and capture of substances handled in the BSL-3, and were necessary to prevent the release of such substances into the outside air. (First Hill Aff. ¶ 7.) This incident resulted in further delay of the Project, which, by this time, appeared to be making no progress towards completion. (First Hill Aff. ¶ 7); (Frew Aff. ¶¶ 5-6); (Rutledge Aff. ¶¶ 5-6.) Those dampers were eventually installed, but only after further disputes and delay. (Rutledge Aff., ¶ 5.)

In June 2005, DPW, which believed that the Project was 90% complete and would require only a relatively small sum of money to reach completion, decided to terminate for convenience its Contracts with SE/Z and Rudeen. (First Hill Aff. ¶ 8); (Frew Aff. ¶ 6); (Rutledge Aff. ¶ 6); (Second Hill Aff., Ex. S (Notices of Termination for Convenience).) Following the termination for convenience of its contracts with SE/Z and Rudeen, DPW retained Washington Group International (“Washington Group”) in July 2005 to inspect the work completed on the Project in order to determine what work was still needed to reach completion of the Project. (First Hill Aff. ¶ 9); (Munio Aff. ¶ 2); (Frew Aff. ¶7); (Rutledge Aff. ¶ 7.) Washington Group ultimately discovered that the mechanical work completed by Hobson was unacceptable by normal industry standards, was seriously defective, and a gross deviation grossly from the Contract specifications. (Munio Aff. ¶¶ 4-11, 12-13 and Ex. B (Project Status Report)); (Frew Aff. ¶ 7); (Rutledge Aff. ¶ 7); (First Hill Aff. ¶ 9.) Washington Group’s inspection revealed serious concealed defects with Hobson’s work, including unacceptable weld conditions (such as a failure to “purge” the welds with argon gas) and seriously damaged materials due to installation error. (Id.) As currently constructed, the bio-safety lab cannot operate safely. (Munio Aff. ¶ 10.)

The original Contract with SE/Z provided a budget of \$1,314,883 to complete the entire Project. (Frew Aff. ¶ 1.) Hobson was to receive a total of \$657,500 for its work on the Project. (Complaint, Ex. A (Subcontract), Art. I.) Despite the fact that Hobson had allegedly completed approximately 90% of its work on the Project, in order to bring the Project to completion, the State must now replace much of Hobson's mechanical work at a cost of well over one million dollars. (Munio Aff. ¶¶ 3, 12); (Munio Aff., Ex. B, p. 11711); (First Hill Aff. ¶ 9.) In other words, the State must expend more than the original Contract price for Hobson's work—and nearly the full original Contract price for the entire Project—to bring the BSL-3 to completion in accordance with the Contract specifications and in a manner that ensures the safety of the surrounding citizenry.

PROCEDURAL BACKGROUND

Despite the above gross deficiencies in its work on the Project, Hobson filed this lawsuit against the State, demanding its claimed costs incurred on the Project, as well as damages for breach of contract and breach of warranty. (Complaint.) SE/Z has filed a cross-claim against the State, seeking payment for Hobson's claimed incurred costs, given that SE/Z was the Prime Contractor on the Project. (SE/Z's Cross-Claim.) The State, in turn, has filed counter-claims against Hobson for breach of contract, breach of warranty, indemnity, and contribution, as well as counter cross-claims against SE/Z for breach of contract, breach of warranty, breach of implied warranty of workmanship, breach of the duty of good faith and fair dealing, indemnity, and contribution.

On April 11, 2006, Hobson filed its Motion for Partial Summary Judgment on Liability and for Summary Judgment Against the State of Idaho, Department of Administration, Division of Public Works' Counterclaims, seeking summary judgment on the basis that the State's

counter-claims and affirmative defenses were barred due to the termination for convenience. SE/Z filed its nearly identical [First] Motion for Partial Summary Judgment on April 14, 2006. On July 24, 2006, this Court issued its Memorandum Decision and Order, ruling that the State's counter-claims and affirmative defenses were not barred as a matter of law because of the termination for convenience. (Memorandum Decision and Order, 7/24/06, pp. 5-7.)

SE/Z and Hobson now seek to avoid responsibility for their faulty work a second time, again pursuing summary judgment as to the State of Idaho's counter-claims³ on the grounds that the State purportedly did not comply with notice provisions contained in its Contract with SE/Z. SE/Z filed its [Second] Motion for Partial Summary Judgment on October 25, 2006, and Hobson filed its Joinder in SE/Z's Motion on November 3, 2006.⁴

The provisions of the Contract upon which SE/Z and Hobson rely ("the notice provisions") are as follows:

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of

³ The State has raised the following counter-claims against Hobson: (1) breach of contract, based upon Hobson's defective, non-conforming, and incomplete work and its failure to adhere to the Project schedule; (2) breach of warranty, due to Hobson's defective work that failed to conform with the Contract documents or with good construction practices; and (3) indemnity and contribution to the extent the State may be held liable to SE/Z, Rudeen, or any of the subcontractors on the Project due to Hobson's wrongful acts or omissions. (State of Idaho's Counter Claim Against Hobson Fabricating Corp.)

Similarly, the State has raised the following counter cross-claims against SE/Z: (1) breach of contract, based upon SE/Z's failure to adhere to the Project schedule, performance of defective work, and failure to provide adequate supervision and coordination of its subcontractors on the Project; (2) breach of warranty, based upon defective, non-conforming, and incomplete work on the Project, as well as delays to the Project; (3) breach of the implied warranty of workmanship, grounded upon the same underlying reasons; (4) breach of the covenant of good faith and fair dealing, also based upon the delays to the Project and defective, non-conforming, and incomplete work on the Project; and (5) indemnity and contribution to the extent the State may be held liable to Hobson, Rudeen, or any of the subcontractors on the Project due to SE/Z's wrongful acts or omissions. (State of Idaho's Counter Cross-Claim Against SE/Z Construction.)

⁴ Hobson additionally filed its separate Motion for Partial Summary Judgment Against the State of Idaho, Department of Administration, Division of Public Works' Counterclaims on November 3, 2006, seeking partial summary judgment on separate grounds. The State will respond to Hobson's Motion with a separate opposition memorandum.

failure to strictly comply with the Contract's notice provisions. Hobson and SE/Z have made no argument that they were somehow prejudiced by lack of compliance with the notice provisions, nor does the record support that conclusion.

Steve Zambarano of SE/Z has made the bare assertion, in his Affidavit, that to his knowledge, "SE/Z was never provided with an opportunity to correct any alleged defects or deficient work." (Second Zambarano Aff., ¶ 4.) To the extent Hobson and SE/Z may attempt to base an argument of "prejudice" on this statement, Mr. Zambarano's assertion is not supported by the record. In fact, there is ample evidence that Hobson and SE/Z were provided numerous opportunities to correct deficiencies. As discussed previously, Hobson was provided more than one opportunity to correct deficient welds following the welding inspections of Norm Daneri and Mark Bell in 2004. In fact, SE/Z affirmatively represented to the State that the welds were repaired. (Second Hill Aff., ¶ 11 and Ex. I.) Unfortunately, in fact, the welds were not repaired. In its Report of December 21, 2005, Washington Group confirmed that the welding on the Project remained deficient. (Munio Aff, Ex. B.) If any claim of prejudice can be made, it should be made by the State, not SE/Z.

In addition, the Field Observation Reports issued by the Architect in early 2005 identified numerous issues which SE/Z and Hobson were provided the opportunity to rectify. (Second Hill Aff., Exs. K, L); (see also Second Hill Aff., Ex. R (Letter from Frew to Hayes) (directing SE/Z to review and repair the items noted on the Field Observation Notes). Even with respect to the delay on the Project, the State attempted to steer SE/Z towards mitigating the situation. (See Second Hill Aff., Ex. R (Letter from Frew to Hayes) (identifying areas where work could still be continued.)

SE/Z and Hobson cannot demonstrate that they were prejudiced by the State's alleged failure to comply with the Contract's notice provisions. As discussed above, they had actual knowledge of the underlying issues concerning their work on the Project and were provided multiple opportunities during the course of the Project to correct identified deficiencies. At the least, a genuine issue of material fact exists regarding whether SE/Z and Hobson suffered "prejudice."

D. The Notice Provisions Do Not Apply to the Majority of the State's Claims

In addition to the above, the Contract's notice provisions do not make sense vis-à-vis a significant portion of the deficient work and delay on the Project. The notice provisions provide that notice must be given "within ten (10) days from the date that the Claimant knew or should have known of the event or condition." (First Zambarano Aff., Ex. D, Art. 4.3.2) (emphasis added). It is the State's position that it did not and had no reason to suspect the extent of the deficiencies in the work at the time the contract was terminated. At the very least, a genuine issue of material fact exists as to whether the State "knew or should have known" of much of the faulty work prior to the termination of its Contract with SE/Z on June 3, 2005. The magnitude of Hobson's and SE/Z's deficient work on the Project was not revealed to the State until Washington Group issued its report on December 21, 2005. (See Munio Aff., Ex. B.) At the time of the termination of its Contract with SE/Z, the State believed the Project to be 90% complete, requiring only a relatively small sum of money to reach completion. (First Hill Aff. ¶ 8); (Frew Aff. ¶ 6); (Rutledge Aff. ¶ 6.) Following the termination, Washington Group discovered serious concealed defects with Hobson's work and discovered that vast sums of money would be needed to repair the faulty work. (Munio Aff. ¶¶ 3-13 and Ex. B); (Frew Aff. ¶ 7); (Rutledge Aff. ¶ 7); (First Hill Aff. ¶ 9.)

By the time the State discovered the significant latent defects in Hobson's work, the State's contracts with SE/Z and Rudeen had been terminated. (See Second Hill Aff., Ex. S.) In fact, the State had already been sued by both SE/Z and Hobson. Compliance with the Contract's notice provisions was thus a moot issue. Nor would provision by the State of written notice to an Architect no longer even involved with the Project have been logical or of any benefit to Hobson or SE/Z.

The same argument pertains to the State's claims for damages regarding delay on the Project. The full extent of the Project's delay logically could not be calculated until either the completion of the Project, or, in this case, the termination of the Contract. Unless the State were obligated to complete the unreasonable requirement of providing written notice to Rudeen on every single day the Project was delayed past the Contract completion date, the State's notice obligation did not ripen until the full extent of the delay was known by the parties (i.e. at the end of the Project or cessation of the Contract). Once the full extent of the delay was known by the State, the Contract was no longer in effect.

Because the Contract notice provisions were not applicable to the bulk of the issues giving rise to the State's counter-claims in this litigation, summary dismissal of those claims is not warranted.

CONCLUSION

Hobson and SE/Z's narrow approach to the Contract's notice provisions does not comport with Idaho law, which requires an examination of relevant factors such as actual notice and prejudice. Genuine issues of material fact exist as to whether SE/Z had actual notice of the issues underlying the State's counter-claims and whether SE/Z suffered any prejudice with respect to purported failure to comply with the Contract's notice provisions. Most significantly,

the Contract's notice provisions did not even apply to the majority of the issues giving rise to the State's claims. For the reasons set forth above, the State respectfully requests that this Court deny Hobson's and SE/Z's Motions.

DATED this 30th day of November, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
Jeremy C. Chou
Deputy Attorney General

By



Phillip S. Oberrecht
Special Deputy Attorney General
Of the Firm Hall, Farley, Oberrecht
& Blanton, P.A.
Attorneys for Defendants State of Idaho,
Ken Gardner, David Rooke, Jan Frew,
Larry Osgood, Chris Motley, and Elaine Hill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November, 2006, I caused to be served a true copy of the foregoing DEFENDANT STATE OF IDAHO'S OPPOSITION TO SE/Z CONSTRUCTION, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF HOBSON FABRICATING CORP.'S JOINDER IN SE/Z'S MOTION, by the method indicated below, and addressed to each of the following:

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Phillip S. Oberrecht

I

DEC 14 2007

J. DAVID NAVARRO, Clerk
By INGA JOHNSON
DEPOSED BY MA

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEC 18 2007

HALL, FARLEY, OBERREC
& BLANTON, P.A.

HOBSON FABRICATING CORP., an
Idaho corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, ACTING BY AND THROUGH
ITS Department of Administration,
Division of Public Works,

Defendants.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant/
Counter-Cross-Defendant,

vs.

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Cross-Defendant/
Counter-Cross Claimant.

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Case No. CVOC0508037

ORDER DENYING MOTION FOR
RECONSIDERATION

1 Counterclaimant,

2 vs.

3 HOBSON FABRICATING CORP., an
4 Idaho corporation,

5 Counterdefendant.

6 STATE OF IDAHO, acting by and
7 through its Department of Administration,
8 Division of Public Works,

9 Third-Party Plaintiff,

10 vs.

11 RUDEEN & ASSOCIATES, a
12 professional company, an Idaho limited
13 liability company,

14 Third-Party Defendant.

15 On February 28 2007, this Court entered a Memorandum Decision and Order Granting
16 Plaintiff Hobson's Motion for Partial Summary Judgment and Denying Counterdefendant SE/Z's
17 Motion for Partial Summary Judgment.

18 On March 19, 2007, SE/Z filed a Motion for Reconsideration of the second portion of that
19 Order; that is, the Order denying its Motion for Partial Summary Judgment against the Idaho
20 Department of Public Works. Hobson, the subcontractor, joined SE/Z's motion providing
21 additional facts in support of the Motion for Reconsideration. The parties have submitted numerous
22 affidavits in support of and in opposition to the original motion and the instant motion.
23

24 The Court will forego a recitation of the entire factual and procedural background of the
25 case. For purposes of this Order, suffice it to say, that the Motion for Reconsideration filed on
26

1 March 19, 2007, was not scheduled for hearing until November 8, 2007. At the end of that hearing,
2 the Court informed the parties that it would hold the matter in abeyance pending a mediation
3 conference which was scheduled for December 11th and 12th, 2007. On December 12, 2007, a
4 status conference was held after the mediation failed to settle the case. The Court informed the
5 parties that they could consider the Motion for Reconsideration fully under advisement at that time.

6 A motion for reconsideration is brought under Idaho Rule of Civil Procedure
7 11(a)(2)(B). On a motion for reconsideration, the trial court may consider new or
8 additional facts presented with the motion. *Noreen v. Price Dev. Co., L.P.*, 135
9 Idaho 816, 820, 25 P.3d 129, 133 (Ct. App. 2001). The trial court should
10 reconsider the new facts presented with the motion along with any facts deemed
11 established pursuant to IRCP 56(d) to determine the correctness of the order at
12 issue. *Coeur d'Alene Mining Co., v. First Nat'l Bank*, 118 Idaho 812823, 800
13 P.2d 1026, 1037(1990). The moving party has the burden of bringing new facts
14 to the Court's attention and the Court is not required to search the record in
15 anticipation of new information that might change the specification of facts
16 deemed to be established. *Id.* The decision of whether to grant a motion for
17 reconsideration rests within the discretion of the trial court.

18 In the Court's February 28, 2007 Order Denying the Motion for Summary Judgment, the
19 Court held that strict compliance with the notice provision was not required of the party who the
20 notice provision was intended to protect if the party had actual notice and was not prejudiced by the
21 lack of strict compliance with the notice requirement. The Court denied SE/Z's Motion for Partial
22 Summary Judgment because the issue of actual notice and prejudice are, and remain, genuine issues
23 of material fact. Additionally, the Court held that even if strict compliance were required in spite of
24 lack of prejudice and actual notice, then a question of fact still existed regarding whether or not SE/Z
25 had waived its right to strict compliance due to hidden evidence of deficient work.

26 In support of the Motion for Reconsideration, SE/Z submitted extrinsic evidence in the form
of deposition testimony regarding the urged interpretation of the strict notice requirement. The use
of extrinsic evidence to resolve ambiguities in contracts is certainly appropriate; however, the

1 question is not whether the contractual provision is ambiguous; rather the question is whether actual
2 notice, together with lack of prejudice, is an exception to the strict notice requirement. Under Idaho
3 case law cited in the original decision, the answer to that question must be answered in the
4 affirmative.

5 SE/Z argues it was prejudiced by the State's non-compliance with the strict notice provision,
6 in that the failure to give them notice deprived them of their opportunity to cure alleged defects,
7 resolve their differences and mediate the claims prior to the filing of the lawsuit. However, because
8 there is evidence that the parties did in fact (unsuccessfully) participate in mediation prior to the
9 filing of the lawsuit, there remains a factual question as to whether SE/Z was actually prejudiced.
10 Summary judgment is inappropriate.

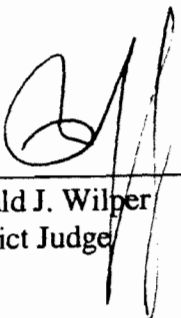
11
12 The contractors also presented deposition testimony of certain people who were themselves
13 unaware of any deceptive attempts on the part of the contractors to hide poor workmanship.
14 However, the State presented evidence that inspections after the termination of the contract unveiled
15 serious concealed defects with the contractor's work. Thus, SE/Z and Hobson have not eliminated
16 the questions of fact that preclude the granting of the Motion for Summary Judgment.

17 CONCLUSION

18 For the reasons set forth in the Court's February 28, 2007, Order denying SE/Z's Motion for
19 Partial Summary Judgment, the Court concludes that genuine issues of fact regarding whether or not
20 SE/Z received actual notice of the allegations contained in the Complaint and whether SE/Z was
21 prejudiced by the lack of strict compliance with the notice provision preclude the Court from
22 granting the Motion for Partial Summary Judgment on the State's claim. Therefore, the Motion for
23 Reconsideration is hereby denied.
24

5 IT IS SO ORDERED.

Dated this 14th day of December, 2007.



Ronald J. Wilper
District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 17 day of December, 2007, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.⁵

- 4.3.2 Time Limits on Claims. A Claim by either party must be made by written notice to the Architect within ten (10) days from the date that the Claimant knew or should have known of the event or condition. Unless the Claim is made within the aforementioned time requirements, it shall be deemed to be waived. The written notice of Claim shall include a factual statement of the basis for the Claim, pertinent dates, contract provisions offered in support of the Claim, additional materials offered in support of the Claim and the nature of the resolution sought by the Claimant. The Architect will not consider, and the Owner shall not be responsible or liable for, any Claims from subcontractors, suppliers, manufacturers, or other persons or entities not a party to this Contract. Once a Claim is made, the Claimant shall cooperate with the Architect and the party against whom the Claim is made in order to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition.

(Affidavit of Steve Zambarano, filed 4/06 ("First Zambarano Aff."), Exs. C, D (Contract and Supplemental Terms).)

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is only appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); City of Sun Valley v. Sun Valley Co., 128 Idaho 219, 912 P.2d 106 (1996). The Court must liberally construe the facts in favor of the non-moving party when making its determination. I.R.C.P. 56(c); Quinlan v. Idaho Com'n for Pardons & Parole, 138 Idaho 726, 69 P.3d 146, 149 (2003). "In making this determination, all

⁵ This definition of "Claim" is the standard AIA A201 definition and was not altered for purposes of the Contract.

allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion.” Id., citing Thomson v. City of Lewiston, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). The moving party bears the burden of establishing the absence of material facts. Quinlan, 138 Idaho at 149.

ARGUMENT

SE/Z’s and Hobson’s argument for summary dismissal of the State’s counter-claims rests solely on the unsupported assertion that the State was obligated to strictly comply with provisions in the Contract related to notice of “Claims” and that the State purportedly failed to do so. (See Memorandum in Support of SE/Z Construction, LLC’s [Second] Motion for Partial Summary Judgment (“SE/Z’s Memorandum”).) SE/Z and Hobson argue that the State’s counter-claims should be dismissed as a matter of law, claiming that the State did not provide notice under the Contract of its counter-claims.

Hobson and SE/Z’s strict and narrow interpretation of the Contract provisions is unsupported by Idaho law. Hobson and SE/Z had adequate notice of issues underlying the State’s counter-claims in this matter and have not been prejudiced by any purported lack of compliance with the Contract’s notice provisions. In addition, the majority of issues underlying the State’s counter-claims were not fully discovered until after the Contract was terminated; thus, the notice provisions are inapplicable to any resulting claims.

A. Idaho Law Does Not Support Hobson’s and SE/Z’s Narrow Interpretation of the Contract

Hobson and SE/Z rely upon the assumption that the State was obligated to strictly comply with the Contract’s notice provisions, but offer no support for this bare assertion. Their narrow interpretation of the State’s purported obligations is contrary to settled Idaho law. First, Hobson and SE/Z have mischaracterized the notice provisions within the Contract by broadly asserting

that notice was a “condition precedent” and that failure to comply with such provisions constituted a “material breach of the contract.” Second, and most significantly, Hobson and SE/Z ignore clear Idaho law holding that it is appropriate for this Court to take into consideration whether the party or parties for whose benefit the notice was to be provided had actual notice of the underlying facts and whether such parties were prejudiced by any lack of compliance with the notice provisions.

1. Hobson and SE/Z Mischaracterize the Notice Provisions as a “Condition Precedent”

Despite the fact that the term “condition precedent” is not contained in either Section 4.3.1 or 4.3.2, Hobson and SE/Z assert that provision of notice in accordance with the Contract’s notice provisions was a “condition precedent.” (SE/Z’s Memorandum, pp. 11-12.)⁶ Based on this assertion, Hobson and SE/Z have further argued: “DPW’s failure to satisfy the conditions precedent in the Supplementary Conditions 4.3.1 and 4.3.2 constitute[s] a material breach of contract. DPW cannot materially breach the conditions of the Contract and then take advantage of its own wrong, claiming breach by SE/Z.” (*Id.* at 12.) Hobson and SE/Z’s attempt to create a condition precedent in the Contract and then use that faulty premise to bootstrap an alleged breach is a mischaracterization of the Contract provisions.

As Hobson and SE/Z themselves have stated, “[a] condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due.” *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005) (emphasis added); see also *Johnson v. Lambros*, ___ P.3d ___, 2006 WL 3040924, * 6 (Idaho Oct. 27, 2006) (holding that a condition precedent involves an event upon which performance

⁶ The term “condition Precedent” appears explicitly in the Contract, but not in either Section 4.3.1 or 4.3.2. Sections 4.4.1 and 4.5.1 state that a decision of the Architect on a Claim is a “condition precedent” to mediation or litigation. Accepting Hobson and SE/Z’s strict interpretation of the requirements for a Claim, they also failed to meet such requirement because there has been no Architect’s decision on their Claims.

under the contract hinges). For example, in Johnson, the Idaho Supreme Court recently held that provision of clear title by the defendant was a condition precedent to the parties' performance under the contract of completing a sale of real property. Id. at * 1, 6. In the case at hand, provision of notice to the Architect of a "Claim" was not a "condition precedent" giving rise to performance of the parties' primary duties under the Contract. See id. at * 6. If, for example, notice of a "Claim" was required prior to SE/Z's completion of the bio-safety lab, such notice could constitute a "condition precedent" to a central performance under the Contract. However, provision of notice under the Contract does act as a "trigger" for any primary performance by a party to the Contract.⁷

Neither would failure to comply with the notice provisions constitute a "material breach of the contract," as SE/Z and Hobson suggest. "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract."⁸ Independence Lead Mines v. Hecla Mining Co., 143 Idaho 22, 137 P.3d 409, 415 (2006). The "fundamental purpose" of the Contract at issue was the construction of the BSL-3. (See First Zambarano Aff., Ex. C.) Any purported lack of provision of notice regarding "Claims" did not "touch[]" the fundamental purpose of the contract [or] defeat[] the object of the parties in entering into the contract," which was to construct the BSL-3. Independence Lead Mines, 143 Idaho 22, 137 P.3d at 415. Hobson's and SE/Z's unsupported assertion that the State somehow materially breached the Contract falls flat.⁹

⁷ While Hobson and SE/Z may argue that notice was a condition precedent to raising later claims, the tenor of their current argument suggests that it is a condition precedent to the parties' central performance under the Contract and that any alleged breach thereof was a "material breach of the contract." This position is not supported by Idaho law.

⁸ Incidentally, "[w]hether a breach of contract is material is a question of fact." Independence Lead Mines, 143 Idaho 22, 137 P.3d at 415 (emphasis added).

⁹ In addition, Hobson's and SE/Z's assertion that the State is "taking advantage" of its purported failure to comply with the notice provisions is illogical. (See SE/Z's Memorandum, p. 12.) This is not a situation where the State somehow "escape[d] from liability for not rendering [its] promised performance by preventing the happening of the condition on which [the performance] was promised." Dengler, 141 Idaho at 128, 106 P.3d at 454.

2. Idaho Law Does Not Require Grant of Summary Judgment in this Case

The Idaho courts have long taken a realistic approach to compliance with notice provisions such as the one at issue, both in contractual and statutory settings, taking into account such factors as whether the other party had actual notice and whether the other party was prejudiced by lack of strict compliance with notice provisions. In Quinn v. Hartford Accident & Indemnity Co., the Idaho Supreme Court examined a contract with the following provision:

[I]t shall be a condition precedent to any right of recovery hereunder that, in the event of any default on the part of the Principal, a written statement of the particular facts showing the date and nature of such default shall be immediately given by the Obligee to the Surety and shall be forwarded by registered mail to the Surety at its Home Office in the City of Hartford, Connecticut.

Quinn, 71 Idaho 449, 452, 232 P.2d 965, 966 (1951). The Court reversed the trial court's dismissal of the plaintiff's claims, which had been based, in part, on the plaintiff's failure to provide written notice, by registered mail, to the defendant's home office in Hartford, Connecticut, a specified "condition precedent to any right of recovery" under the contract. Id. at 454, 232 P.2d at 967-68. In ruling that strict compliance with the above notice provision did not bar the plaintiff's claim, the Court held:

It [] appears [defendant] at all times had actual notice of Kelson's action under the building agreement; and it does not appear from the evidence that [defendant] was in any way prejudiced in its rights by the failure of [plaintiff] to give notice to [defendant] at its office in Hartford, Connecticut.

Id. at 454, 232 P.2d at 968 (emphasis added).

Similarly, in Leach v. Farmer's Automobile Interinsurance Exchange, the Idaho Supreme Court held that an insured was not obligated to strictly comply with notice provisions contained in an insurance contract, requiring the insured to provide written notice to the insurer of any

occurrence under the policy, including a “statement of particulars” regarding the occurrence.

Leach, 70 Idaho 156, 161, 159, 213 P.2d 920, 922-23 (1950). The Court held:

The record amply sustains the finding that the defendant was not prejudiced. The company accepted [] oral notice, and acted upon it over a period of more than three months before demanding the nonwaiver agreement. This was sufficient to lead the [in]sured to believe no formal written notice would be required. . . . [T]he company had actual knowledge . . .

Id. at 161, 213 P.2d at 923 (emphasis added).

As in Quinn and Leach, the Idaho courts have held in a variety of circumstances that a party need not strictly comply with contractual notice provisions. See Olson Bros. v. Hurd, 20 Idaho 47, 116 P. 358, 361 (1911) (holding that a party sufficiently complied with the notice provisions of a sales contract requiring notice provided to a particular location by providing oral notice to the other party at a different location); Thompson v. Fairchild, 93 Idaho 584, 587, 468 P.2d 316, 319 (1970) (holding, with respect to notice of forfeiture under a land sale contract: “[W]hether or not the formal requirements regarding the giving of notice as prescribed by the written instrument were complied with is immaterial where it is clear that notice was in fact received. The record further demonstrates that appellant was in no way prejudiced . . .”); Wickahoney Sheep Co. v. Sewell, 273 F.2d 767 (9th Cir. 1959) (applying Idaho law in a diversity jurisdiction case, and holding: “The purpose of notice of default in the usual case is to give the party allegedly in default an opportunity to remedy the default and meet his obligation, and notice in the prescribed manner [under a contract] is not required where a party has actual notice and has not suffered prejudice.”) (internal citations omitted).

This is equally true in the construction context. In Beco v. Roberts & Sons Constr. Co., Inc., the Idaho Supreme Court allowed a subcontractor to pursue his claims for extra work against the prime contractor on a construction project. Beco, 114 Idaho 704, 760 P.2d 1120

(1988). This was despite the fact that, as the dissent in Beco noted, the subcontractor did not comply with the contract's notice provisions, which were remarkably similar to the notice provisions in the Contract at hand. See id. at 719-20, 760 P.2d at 1135-36. The contract provided "that extra work claims 'shall be deemed waived by Subcontractor unless written notice thereof is given the Contractor within ten days after the date of its origin.'" Id. at 719, 760 P.2d at 1135. Although the subcontractor failed to provide written notice of its claims for extra work until months after the ten-day period had elapsed, the Court allowed the subcontractor's claims to proceed and upheld the jury's verdict in favor of the subcontractor on its claims for extra work. See also Consolidated Concrete Co. v. Empire West Constr. Co., Inc., 100 Idaho 234, 236-37, 596 P.2d 106, 108-09 (1979) (holding that a subcontractor need not strictly comply with the statutory notice provisions contained in Idaho Code § 54-1927, governing claims for labor, services, or equipment provided on a public works construction project, and noting that the question of whether a party has received notice "is a question of fact.") (emphasis added); accord Sch. Dist. No. 91, Bonneville Cty., State of Idaho, For the Use & Benefit of Idaho Concrete Prods., Inc. v. Taysom, 94 Idaho 599, 603, 495 P.2d 5, 9 (1972); see also Hoel-Steffen Constr. Co. v. United States, 456 F.2d 760, 768 (U.S.Cl.Ct. 1972) (holding that "notice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally where the [other party] is quite aware of the operative facts."); Calfon Constr. Inc. v. United States, 18 Cl.Ct. 426, 439 (U.S. Cl. Ct. 1989) (emphasizing the issue of whether a party has knowledge of the essential facts when assessing whether additional provision of notice was necessary under a contract-adjustment clause.)

In sum, under Idaho law, it is appropriate for this Court to take into consideration whether the party or parties for whose benefit the notice was to be provided had actual notice of

the underlying facts and whether such parties were prejudiced by any lack of compliance with the notice provisions. The above involve material questions of disputed fact, rendering summary judgment in this matter unwarranted, as discussed in more detail below.

B. A Genuine Issue of Material Fact Exists Regarding Whether SE/Z Had Actual Knowledge of Underlying Issues

In support of its Motion, Hobson has filed an Affidavit of Steve Zambarano (“Second Zambarano Aff.”), asserting that SE/Z “was never provided with a written notice from DPW identifying that [the State] asserted entitlement to the payment of money;” “was unable to locate any documents, correspondence or written notice from [the State] to the architect by which [the State] provided written notice of its claims;” “was [n]ever made aware of the affirmative claims asserted by [the State] in its Cross-claim against SE/Z;” “was never provided with an opportunity to correct any alleged defects or deficient work;” and first received information regarding the State’s claims “many months after [the State] terminated the parties’ Contract.” (Second Zambarano Aff., ¶¶ 2-5.) The above assertions are unsupported by the record and serve to emphasize that a clear factual dispute surrounds the issue of whether SE/Z¹⁰ had actual notice of the deficiencies and delays giving rise to the State’s current counter-claims.

Overwhelming evidence in the record demonstrates that SE/Z was repeatedly informed throughout the Project of various deficiencies and non-conformities in the work performed on the Project under SE/Z’s supervision. The most obvious examples can be found in the reports of welding inspector Mark Bell. On May 25, 2004, Mr. Bell wrote to Elaine Hill, the State’s Project Manager for the BSL-3 Project:

This is the report on the inspection of the weldments of the stainless steel ducting at the BSL on Penitentiary Road . . .

¹⁰ Because Hobson was not a party to the Contract, SE/Z is the relevant party for this particular inquiry.

. . . . This work has not been p[er]formed to any standard of workmanship or quality. A reasonable contractor, knowing the application of this ducting, does have a duty to provide a nominal standard of quality. . . . A reasonable standard of care for a contractor would recognize and address common defects that would compromise the safety and mission of the BSL.

(Second Hill Aff., Ex. D, p. 1) (emphasis added). Mr. Bell noted that the welding, performed by Hobson, displayed multiple defects, including incomplete penetration, overlap, porosity, severe oxidization, crater cracks, and concavity. (Id. at 1-3.) This report was provided to the Architect (Rudeen) and SE/Z. (Second Hill Aff., ¶ 3.) Presumably, SE/Z provided this report to its subcontractor, Hobson.

SE/Z and Hobson were provided with the opportunity to repair the defects identified in Mr. Bell's May 2004 report; in fact, the State even paid SE/Z additional money for Hobson's repair of its faulty welding. (See Second Hill Aff., Exs. E (ASI # 16-R) and G (Contract Change Order No. 9.) Following a second inspection of the welds in August 2004, Mr. Bell reported to Ms. Hill:

It is my opinion that the effort to actually repair the [] especially crucial welds, is marginal. There was not a serious effort to address the problem of through wall thickness porosity. . . . The most serious defect was a deep cut in the base metal from the removal of the original 45-degree elbow.

(Second Hill Aff., Ex. F, p. 1.) After identifying various remaining deficiencies with the welds, Mr. Bell noted:

[T]he contractor has never inspected the welds as required in Section 6. Hobson never inspected the welds in their shop or in the BSL. They did not inspect the repairs I called in May of this year.

(Id. at 3.) Mr. Bell further recommended that he return to re-inspect the welds following repairs, as "Hobson does not have the credibility to be allowed to do the inspection." (Id.) This second

report was also provided to Rudeen, Hobson, and SE/Z. (Second Hill Aff., ¶ 8 and Ex. F.) SE/Z and Hobson were again allowed to fix the welds. (Second Hill Aff., ¶ 10 and Ex. H (ASI 17)).

The above serve as only one example of SE/Z's actual notice of faulty work performed on the Project. In the interest of brevity, the State will not discuss each instance in detail in this Memorandum. However, selected further examples of SE/Z's knowledge of issues with work quality on the Project include the following documents provided to SE/Z: (1) the April 12, 2004 welding inspection report of Norm Daneri, noting unacceptable discontinuities, "sugaring," lack of fusion, possible crater cracks, incomplete welds, as well as "grinding" and "buffing" that looked as if someone had been trying to hide oxidation (significantly, Mr. Daneri opined that all inspected welding failed to conform with the Contract specifications); (Second Hill Aff., Ex. B); (2) Contract Change Order No. 12, issued on October 14, 2004 and signed by Curt Blough of SE/Z, which notes that "[d]uctwork was installed in the project with material not meeting the specifications;" (Second Hill Aff., Ex. J (Contract Change Order No. 12)); (3) a January 13, 2005 Field Observation Report issued by the Architect, noting 17 deficient items, including missing volume dampers (Second Hill Aff., Ex. K; (4) Field Observation Reports issued by the Architect with respect to inspections performed on January 27-28, 2005, identifying numerous issues with work quality, incomplete work, and use of wrong materials; (Second Hill Aff., Ex. L; and (5) Response to Request for Information No. 58, dated March 24, 2005, noting that missing "DOP ports" need to be installed; (Second Hill Aff., Ex. M (Response to RFI No. 58). All of the above documents were promptly provided to SE/Z and Rudeen. (See Second Hill Aff., ¶¶ 13, 14 and 15.)

SE/Z additionally had knowledge of its delays on the Project. The minutes of the January 27, 2004 progress meeting for the Project indicate that Barry Hayes of SE/Z informed the

attendees that the Project was already 14 days behind schedule. (Second Hill Aff., Ex. N (Minutes, 1/27/04), p. 3.) By only one month later, at the February 26, 2004 meeting, attended by representatives of SE/Z, the Project was noted to be 73 days behind schedule. (Second Hill Aff., Ex. O (Minutes, 2/24/04), p. 4); (see also Second Hill Aff., Ex. Q (Letter from Howard to Zambarano, 10/11/04) (discussing delay on the Project). Representatives of SE/Z, Hobson, and Rudeen attended both meetings and copies of the resulting minutes were provided to Rudeen and SE/Z. (Second Hill Aff., ¶¶ 16 and 17.) SE/Z was well aware, at the time of the termination for convenience in June 2005, that the Project was nearly a full year behind schedule, as evidenced in the final Contract Change Order of the Project, issued on June 13, 2005, identifying the Contract completion date as July 25, 2004. (Second Hill Aff., Ex. P (Contract Change Order No. 20).

In short, it is the State's position that there is overwhelming evidence in the record of SE/Z being notified of deficiencies in the work and that, at the very least, a genuine issue of material fact exists regarding whether SE/Z had actual knowledge of the issues and delays giving rise to the State's counter-claims in this matter. The State routinely communicated all of these issues to SE/Z, who was expected to provide all notices to Hobson. Hobson was also present at the meetings where these issues were discussed, and Hobson performed the alleged corrective work.

C. A Genuine Issue of Material Fact Exists Regarding Whether SE/Z Was Prejudiced by Any Purported Lack of Notice

In addition to the fact that a genuine issue of material fact exists as to whether SE/Z had actual knowledge of the facts and circumstances underlying the State's counter-claims, a genuine issue of material fact exists regarding whether SE/Z was prejudiced by the State's purported